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A TREATISE

ON

THE LAW OF SALE

OF

PERSONAL PROPERTY

BY

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IN TWO VOLUMES

VOLUME I

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FLOYD R. MECHEM.

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1901

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To J. C. M.

The long time devoted to the preparation of this book, of right belonged to you; without your encouragement and aid I should not have been able to complete it; and while you have always waived your right and lent your aid in the spirit of most generous helpfulness, I cannot do less than dedicate to you the final product, coupled with sentiments which I need not name, but which your own heart will so readily divine.

PREFACE.

The present work was projected in 1887 and something was then done upon it. It was, however, temporarily laid aside for other tasks, until January, 1892. Since that time it has been constantly in hand and has been prosecuted as rapidly as health and the pressure of many other duties would permit. Notwithstanding the utmost effort, however, it has been delayed long beyond the time originally fixed for its completion.

As it is, the book is very far from being what the writer hoped to make it, or what he still believes he might have made it, had his work been done under more favorable conditions. To retain it longer, however, for further elaboration seems neither practicable nor wise.

The general outline and arrangement of Mr. Benjamin have, in the main, been adopted. This course was decided upon for two reasons: first, because Mr. Benjamin's classification has always been regarded as excellent in itself; but secondly and chiefly, because Mr. Benjamin's analysis (which in its turn was largely that of Lord Blackburn) has so decidedly controlled the development of our law in many important particulars, that to attempt a new classification or nomenclature would be confusing if not presumptuous. Mr. Benjamin's text, moreover, has been freely drawn upon for statements of the English law.

No thought, however, of rivaling Mr. Benjamin's work has been entertained. Indeed, the writer is convinced, after considerable attention to the subject, that an American book following the method of treatment adopted by Mr. Benjamin is impracticable. To show the development of the law by an exhaustive chronological statement of the cases is possible in England, and would be possible in any single State where

one court of last resort would alone need to be considered; but to do the same for the whole United States, with over fifty courts whose more or less conflicting decisions are final within their respective jurisdictions, seems beyond the reach of any reasonable endeavor.

Nevertheless an attempt has been made to base this work upon a careful study of the principal American cases. To this end, the cases have been carefully digested, and abstracts made showing concisely the facts and the rule of law announced. Upon this foundation, the endeavor has been to make a full and clear statement of the general principles which control the subject, and to give such a range of illustration and citation as should show their application. The abstracts and statements of cases have been largely put in the foot-notes rather than in the text, for the purpose of keeping down the volume of the work. The result is that the foot-notes are unusually heavy, possibly unnecessarily so; but if that should be the judgment, the desire to increase the practical usefulness of the book must be pleaded in extenuation.

No attempt has been made to deal with every case upon the subject. Upon many points the cases are now so numerous and uniform that even to cite them all seemed needless use of space. Hundreds of cases have been examined and rejected upon this ground. An effort has been made, however, to include all of the more recent and important cases down to the date of sending the manuscript to the press.

Parallel references to the "Reporters," to the "American Decisions," "American Reports," "American State Reports," and to the "Lawyers' Reports Annotated," have been made, and, in many instances, to the volumes of selected cases upon the law of Sale. Priority of citation has, moreover, been usually given to these cases, upon the theory that they are likely to be the most important and most generally accessible. Illustrations of the most important attempts to codify the law of Sale are given in the Appendix.

When this task was undertaken the writer believed that there was a real need for an American book upon the law of

Sale. In the long time that he has been at work, various contributions to the subject have been made by others, so that it is possible that the need, if it ever existed, has long since been supplied. The writer, however, whether wisely or unwisely, has persisted in his undertaking, and if his work shall prove to have a value in some degree commensurate with the labor spent upon it, he will be content.

FLOYD R. MECHEM.

UNIVERSITY OF MICHIGAN,
Ann Arbor, May 20, 1901.

TABLE OF CONTENTS.

References are to sections.

VOLUME I.

BOOK I.

OF THE CONTRACT OF SALE: ITS FORMATION.

CHAPTER I.

DEFINITIONS.

Sale defined 1
—— Forms of bargaining 2
—— Effect of intention 3
—— Essential elements 4
Further of the definition — Executory or executed sales 5
—— Bargain and sale 6
Absolute and conditional sales 7
Voluntary and forced sales 8
Judicial sales 9
Public and private sales 10

CHAPTER II.

TRANSACTIONS TO BE DISTINGUISHED FROM SALES.

Purpose of this chapter 11
Sale to be distinguished from gift 12
Sale to be distinguished from barter or exchange 13-15
—— Uses of this distinction — Pleading — Statutes — Waiving tort — Construction of authority 16-18
Sale to be distinguished from bailment 19, 20
—— Change of form or substance as the test — Illustrations 21, 22
—— Further illustrations 23
—— Intention of parties as the test 24

References are to sections.

Same subject — Commingling of goods — Effect of custom 25, 26
Commingling with right of sale or use in bailee 27-30
Bailment with privilege of purchase to be distinguished from sale 31
—— Option to buy and pay for chattel or pay for its use 32
Delivery of goods on trial to be purchased if approved 33
Sale with option to return or pay 34
Bailment or sale, how determined — Law or fact 35
Sale to be distinguished from mortgage 36
Sale to be distinguished from pledge 37
—— Sale, not pledge 38
Pledge, not sale 39
Parol evidence to show apparent sale to be pledge or mortgage 40
Sale to be distinguished from mere agency to buy 41, 42
Sale to be distinguished from agency to sell or "consignment" 43-45
—— Principles of construction 46
Illustrations of construction 47
—— Agency, not sale 48
—— Sale, not agency 49
—— How question determined — Law or fact 50
Consignment of goods to pay debt or cover prior advances 51
Sale to be distinguished from contract for work and labor 52
Sale to be distinguished from compromise respecting liens 53
Furnishing of food by restaurant or innkeeper as sale 54
Supplying goods by several common owners to one of them — Social clubs — Intoxicating liquors 55
Transfer of title by operation of law 56

CHAPTER III.

OF THE CAPACITY OF PARTIES — WHO MAY BUY AND SELL.

Purpose of this chapter 57

I. Of Capacity in General.

General rule as to competency 58
Presumption of competency 59
Causes and classification of incompetency 60

1. *Natural Incompetency.*

What here included 61

a. Persons of Unsound Mind.

Scope of present treatment 62
Insane persons as parties to contracts generally 63
Degree of incapacity which avoids 64
Weakness of mind and imposition combined 65
Mere inadequacy of price 66

References are to sections.

Partial insanity — Monomania — Sane interval 67
—— Presumption as to sane intervals 68
Effect of judicial determination of insanity 69
—— Only *prima facie* evidence as to period covered 70
—— Petitioner for proceeding not estopped by it 71
Whether contracts of insane person void or voidable 72
Avoiding contract — Executed and executory 73
—— Protection of innocent party 74, 75
—— Insane person must have received benefit 76
—— Return of consideration necessary 77
—— Right to recover from *bona fide* purchaser 78, 79
Who may disaffirm 80
—— Creditor may not 81
—— Sane party may not 82
Affirmance of contract 83
Contract of insane person for necessaries, binding 84
—— Liability limited to value received 85

b. Incompetency of Drunkards.

Contracts of drunken persons 86
—— Voidable, not void 87
—— *Bona fide* holders 88
Habitual drunkards 89
Partial intoxication coupled with fraud 90
Drunkards under guardianship 91

c. Incompetency of Spendthrifts.

Contracts of spendthrifts, etc 92

2. *Legal Incompetency.*

In general 93

a. Incapacity of Infants.

In general 94
Infant's contracts voidable, not void 95
—— What meant by voidable 96
—— Who may avoid 97
—— When avoided 98
—— When ratified 99
—— How much to be ratified 100
—— Effect of ratification 101
—— Knowledge of non-liability 102
—— Consideration for ratification 103
—— Ratification, how effected 104, 105
Sale or exchange by infant voidable 106
—— When avoided 107
—— How avoided 108

References are to sections.

—— Return of consideration. 109
—— *Bona fide* purchasers..... 110
Chattel mortgage voidable..... 111
—— When avoided..... 112
—— Returning consideration..... 113
—— How avoided..... 114
Purchases voidable, if not necessaries 115
—— When avoided..... 116
—— How avoided..... 117
—— Return of consideration 118
—— Ineffectual defenses — Recoupment — Injury to goods 119
—— Effect of disaffirmance — Revests seller's title..... 120
—— Ratification of purchases 121
Liability of infant for necessaries..... 122
—— For what amount bound..... 123, 124
—— Interest..... 125
—— Goods must have been furnished on infant's account 126
—— Infant not liable if already supplied..... 127
—— Seller supplies goods at his peril..... 128
—— Infant living with parents, etc., presumed to be supplied..... 129
What constitute necessaries 130
—— How determined — Burden of proof..... 131
—— Illustrations..... 132

b. Incapacity of Married Women.

What here considered 133
Common-law disability..... 134
Equitable doctrines as to separate estate 135
Statutes removing disability..... 136
—— To what extent..... 137
—— What contracts she may make..... 138
—— Statutory liability for family necessaries..... 139

c. Capacity of Corporations.

In general..... 140
Corporations as sellers..... 141
Corporations as buyers 142

d. Capacity of Partnerships.

In general..... 143
Partnerships as sellers 144
Partnerships as buyers..... 145

II. Sales by Persons Having Only a Defeasible Title.

Such a person in possession may pass good title to *bona fide* purchaser. 146
—— One holding subject to secret lien..... 147
—— Fraudulent vendee 148

References are to sections.

—— One who obtained goods by trick 149
—— Fraudulent grantee of debtor..... 150
—— Fraudulent debtor..... 151
—— Conditional vendee..... 152
—— Purchaser for cash who has not paid 153

III. Sales by Persons Having Only an Ostensible Title.

In general, one cannot convey better title than he has 154, 155
Possession alone insufficient evidence of title..... 156
Possession coupled with indicia of ownership..... 157
—— What requisite..... 158, 159
—— Illustrations..... 160–164
—— Limitations..... 165
Appearance of title from possession of bill of lading or warehouse receipt 166
Ostensible title of vendor in possession..... 167
Ostensible title under Factors Acts..... 168, 169
Ostensible title by conduct..... 170

IV. Sales and Purchases by Persons Acting for Others.

In general..... 171
Nature of authority..... 172

1. *Authority to Sell Personal Property.*

How considered..... 173

a. Authority to Sell Conferred by Law.

Chief illustrations..... 174

b. Authority Conferred by Act of Party.

Express authority to sell..... 175
Implied authority to sell..... 176
—— None implied from mere possession..... 177
None implied from mere relationship — Husband and wife — Parent and child..... 178
None implied from authority to do other kinds of acts..... 179

2. *Authority to Buy Personal Property.*

How considered..... 180

a. Authority to Buy Conferred by Law.

Chief instances..... 181
Authority of wife to buy necessaries on husband's credit..... 182
—— Where parties are living together..... 183
—— Where parties are living apart..... 184
—— What constitute necessaries..... 185
Authority of infant child to buy necessaries on parent's credit..... 186

References are to sections.

b. Authority to Buy Conferred by Act of Party.

Express authority to buy 187
Implied authority to buy 188
—— Not implied from mere relationship of parties 189

V. Sales by Persons Acting in an Official Capacity.

In general 190
Authority must be strictly construed 191
Officer must keep within the term and territory of his office 192
Officer cannot deal with himself 193
Purchasers at execution, tax, and similar sales 194
Purchases at executors', administrators' and guardians' sales 195
Trustees' sales 196

CHAPTER IV.

OF THE THING SOLD—WHAT MAY BE BOUGHT AND SOLD.

What may be sold 197
No present sale until chattel ascertained 198
Thing sold must be in existence 199
Things potentially in existence 200, 201
Things not yet acquired by vendor 202
Sales for future delivery 203

CHAPTER V.

OF THE PRICE.

Necessity of a price 204
—— Executory contracts 205
—— Executed contracts 206
Where price not agreed upon, reasonable value will determine 207
Market price—Market controlled by monopolistic combination 208
Other methods of fixing price 209
Price must be fixed with certainty 210, 211
Price to be fixed by valuers 212, 213
Payment of the price 214

CHAPTER VI.

OF THE CONTRACT OF SALE—IN GENERAL.

Purpose of this chapter 215
Of the contract in general 216

I. Of Mutual Assent.

Necessity of mutual assent 217
Assent need not be express 218

References are to sections.

Assent must be mutual, unconditional and co-existent 219
Mere negotiations not amounting to proposition and acceptance .. 220–223
Mere announcements or price lists not offers 224, 225
Offer must be accepted 226
Offer must be accepted as made 227, 228
Counter-proposition operates as a rejection 229
—— What constitutes such counter-proposition 230, 231
—— If counter-proposition accepted, contract results 232
—— Original proposition not open to acceptance after rejection by counter-proposition 233
Terms of sale must be fully agreed upon 234
Negotiations in contemplation of more formal contract 235–237
Acceptance must be communicated 238
Manner of accepting 239
—— What constitutes 240
—— Acceptance by conduct 241–243
Time of acceptance 244, 245
Question of acceptance, how determined 246
Communication by mail, telegraph, etc. 247
—— Method of acceptance in these cases 248–250
—— Time of acceptance in these cases 251
Right to withdraw offer 252
—— Voluntary offer may be withdrawn, though time given for its acceptance 253
—— Voluntary offer may be revoked, though declared "irrevocable". 254
—— Unaccepted offer not such a contract as excludes parol evidence. 255
—— Agreement for consideration not to withdraw offer 256
—— How offer revoked 257
—— Mailing letter, etc., not enough 258
—— Offer under seal 259
—— Lapse of offer—Notice 260
—— Waiver of revocation 261
Withdrawal of acceptance 262

II. Unilateral Contracts.

Unilateral contracts 263, 264

III. Of the Effect of Mistake in Making the Contract.

Mistakes of parties in making the contract 265
Mistake as to nature of transaction 266
Mistake as to identity of party 267–269
Mistake regarding the thing sold 270
—— Existence of thing sold 271
—— Identity of thing sold 272
—— Unknown articles contained or concealed in thing sold 273

References are to sections.

—— Mistake as to quantity 274
—— Mistake as to kind, quality or character 275, 276
—— Mistake as to location 277
Mistake as to terms of contract — Price 278
Mistake as to possibility of performance 279

CHAPTER VII.

OF THE CONTRACT OF SALE UNDER THE STATUTE OF FRAUDS.

Purpose of this chapter 280
Sales prior to the statute 281

I. The Statute.

The seventeenth section of the Statute of Frauds 282, 283
English Sale of Goods Act 284
Statutes in United States 285–290
General effect of the statutes 291

II. What are Contracts for the Sale of Goods, Wares and Merchandise.

Importance of this question 292

1. *Executory Contracts.*

Statute applies to executory contracts 293

2. *Contracts of Sale or Manufacture.*

Statute applies only to contracts of sale and not for manufacture 294
English cases — Immediate sale as the test 295–297
—— Impossibility of present delivery as the test — Goods not in existence 298, 299
—— Work on one's own materials as the test 300
—— Whether work or materials is the essence of the contract, as the test 301
—— The present English test 302, 303
American cases — The rule in New York 304, 305
—— The rule in Massachusetts 306, 307
The rule in Vermont, Oregon, Washington and Michigan 308–310
—— The rule in Maine and New Hampshire 311–313
—— The rule in Wisconsin and California 314, 315
—— The rule in New Jersey 316
—— The rule in New Mexico 317
—— The rule in Colorado 318
—— The rule in Minnesota 319
—— The rule in Missouri 320
—— The rule in Georgia 321, 322

References are to sections.

—— The rule in Maryland 323
—— The rule in Iowa..... 324, 325
—— The true rule 326

3. *Auction Sale.*

Auction sales within the statute..... 327
Contracts of barter or exchange within the statute..... 328

III. What are Goods, Wares and Merchandise.

English rule includes only corporeal movable property..... 329
Rule in United States more comprehensive..... 330
What included — Stocks — Notes — Inventions 331
—— Fixtures..... 332–335
—— Growing trees 336–339
—— Growing crops..... 340–344
—— Crops to be raised 345
—— Uncut ice 346
—— Minerals..... 347

IV. Of the Price or Value.

Operation of the statute 348
Sale of several articles aggregating more than the limit 349, 350
Sale of various articles at auction..... 351
How when amount uncertain at time of sale 352

V. Of Acceptance and Receipt.

What the statute requires..... 353
Delivery, acceptance and actual receipt required..... 354

1. *Of Delivery by the Seller.*

Necessity of delivery 355
Delivery alone not enough..... 356

2. *Of Acceptance by the Buyer.*

Acceptance must be shown 357
—— Must be voluntary and unconditional..... 358
—— No acceptance while awaiting test or opportunity for examination 359
Acceptance may be implied..... 360, 361
When acceptance must occur..... 362
Who may accept — Agent..... 363
—— Tenant in common..... 364
—— Carrier 365
—— Administrator 366
That buyer ought to accept, not enough..... 367
Whether acceptance must be final and conclusive..... 368–370
—— Acceptance of unfinished article..... 371

References are to sections.

Burden of proof as to acceptance... 372
Question for the jury... 373
Right of seller to retract before acceptance... 374

3. *Of Receipt by the Buyer.*

Necessity of receipt... 375
Nature of receipt required... 376
Fact that title would have passed, not enough... 377
Constructive delivery and receipt... 378, 379
—— What sufficient... 380, 381
Mere words do not constitute delivery and receipt... 382, 383
Delivery and receipt where goods still remain in seller's possession 384, 385
—— Goods remaining in seller's possession as seller... 386
Delivery and receipt where goods are in possession of third person 387, 388
Delivery and receipt where goods are already in possession of purchaser 389
Delivery where seller and buyer occupy same premises... 390
Receipt by common agent... 391, 392
—— Carrier as agent to receive... 393
Acceptance and receipt may precede passing of title... 394
Receipt and acceptance may be complete though terms of contract in dispute... 395
No title passes until receipt and acceptance... 396
Question of receipt for the jury... 397

4. *Part of the Goods Sold.*

Acceptance and receipt of part of goods suffices... 398
Any part, though small, enough... 399
But it must actually be a part of the goods sold — Sample — Specimen 400
At what time part may be accepted and received... 401
After part acceptance, loss of remainder falls on buyer... 402
Acceptance and receipt of part must be in pursuance of the contract. 403

5. *Earnest or Part Payment.*

a. Of Earnest.

Earnest and part payment synonymous... 404
Thing in earnest must be actually given... 405
Must be a thing of some value... 406
Deposit with third person by way of forfeiture not enough... 407
Effect of earnest in passing the title... 408

b. Of Part Payment.

What the statute requires... 409
The amount required... 410
What may be paid... 411
—— Check... 412
—— Buyer's note... 413

References are to sections.

—— Note of stranger 414
—— Money already in hands of seller 415
—— Satisfaction of previous debt 416
—— Payment of seller's debt to third person 417
Mere tender of part payment not enough 418
When part payment to be made 419, 420
Part payment to agent suffices 421

6. *The Note or Memorandum.*

What the statute requires 422

a. What is a Note or Memorandum.

Is distinct from the agreement itself 423
At what time to be made 424
Form of note or memorandum 425
Several papers 426, 427
Letters 428
Telegrams 429
Books 430
Records of corporate meetings 431
Not necessary that note be addressed to or pass between the parties ... 432

b. What Note or Memorandum is Sufficient.

The requisites in general 433
Parties must be named or described 434
—— What description sufficient 435
—— Agent named instead of principal 436
Goods sold must be stated or described 437
Price must be shown 438
Terms of credit and mode of payment must be stated 439
Time and place of delivery must be stated if agreed upon 440
All other material terms must be included 441
Consideration need not be expressed unless required by statute 442
Memorandum must show complete contract 443
Memorandum must import a sale 444
Parol evidence not admissible to supply deficiencies 445
Parol evidence to contradict complete memorandum 446, 447
But defendant may show memorandum, relied upon by plaintiff, to be incomplete 448

c. Of the Signing by the Parties.

Whether both parties must sign 449
Written offer accepted by parol 450
How to be signed 451

References are to sections.

d. Of Signing by Agent.

Who may be agent 452
How appointed 453
—— Several owners — One as agent for all 454
How sign 455–458
One person as agent for both parties 459
—— Evidence of authority 460
Signing by auctioneer 461
Auctioneer selling his own goods cannot sign for both 462
Broker as agent for both parties 463–466
"Bought and sold notes" in English practice 467
—— English rules governing 468
—— Bought and sold notes in the United States 469
—— Revocation of broker's authority 470
Signing by one partner 471

e. Of Alteration of the Memorandum.

Effect of alteration 472
Memorandum not to be altered by parol 473
Discharge or substitution of agreement may be shown 474

BOOK II.

OF THE EFFECT OF THE CONTRACT IN PASSING TITLE.

CHAPTER I.

PURPOSE OF BOOK II.

Subjects yet to be considered 475
Executory and executed contracts 476
—— Intention of parties as the test 477–479
Specific or unascertained goods 480
How questions classified 481

CHAPTER II.

OF THE UNCONDITIONAL SALE OF SPECIFIC CHATTELS.

Purpose of this chapter 482
Title passes at once on unconditional sale of specific chattel 483, 484
Title may pass though goods not delivered 485, 486
—— Or though seller is yet to make delivery 487, 488
—— Or though seller is to do some other act before delivery 489

References are to sections.

—— Or though seller is to do something to the goods after delivery... 490
—— Or though goods are in hands of seller's bailee or agent..... 491
—— Or though goods remain with seller as bailee for buyer..... 492
Title may pass though price not yet paid 493–495
—— Or though something remains to be done to ascertain the price 496–498
The question is one of intention..... 499
Rules for determining the intention 500, 501
Question of intention, by whom decided..... 502

CHAPTER III.

OF THE CONDITIONAL SALE OF SPECIFIC CHATTELS.

Purpose of this chapter..... 503
What classes of cases to be considered..... 504–506

I. Where Goods are to be Prepared for Delivery.

Where specific goods are to be completed or prepared for delivery, no title passes until this is done... ..... 507, 508
Unless a contrary intention appears..... 509–511
—— But title will pass when required act is done..... 512
Effect of part performance of condition..... 513
Effect of earnest or part payment..... 514

II. Where Goods are to be Measured, Weighed or Tested.

Title to goods not delivered presumptively does not pass if goods are yet to be weighed, measured or tested to ascertain price..... 515–517
—— Presumption not conclusive..... 518
—— Broader rule in some States..... 519
Nor where goods are yet to be measured, etc., with a view to identification..... .... 520, 521
Nor where goods are yet to be measured, etc., in order to ascertain if they comply with contract..... ..... 522, 523
By whom weighing, etc., to be done.. 524
How where whole body of goods is delivered to buyer... 525–527
—— What delivery sufficient..... 528
—— How when contemplated method fails..... ..... 529, 530
Effect of part performance..... 531
Effect of earnest or part payment. 532

III. Where Buyer is to do Something Other than Pay Price.

What here included..... 533
Title will not pass till act performed..... 534, 535
Unless a contrary intention appears..... 536

IV. When Payment of Price a Condition Precedent.

What here included..... 537

References are to sections.

1. *Payment of Price as Implied Condition Precedent.*

In general — Payment as condition precedent when sale for cash. 538, 539
Payment as implied condition where sale expressly for cash..... 540
—— Meaning of "cash sale"..... 541
—— Title may pass though possession retained — Payment and delivery concurrent..... 542
—— Or title may not pass until payment..... 543, 544
—— Check or draft not payment..... 545
Giving of note or security as condition precedent..... 546, 547
—— Consideration for condition..... 548
Waiver of condition of payment or security..... 549
—— Delivery to carrier as waiver..... 550
Further of waiver..... 551–553
Goods may be retaken if condition not performed..... 554
—— Even from *bona fide* purchaser..... 555
—— Clearly from attaching creditors, etc..... 556
—— Usage does not defeat..... 557

2. *Payment of Price as Express Condition Precedent, and herein of "Conditional Sales" or "Instalment Contracts."*

Formal contracts of so-called "conditional sales"..... 558
Confusion respecting name..... 559
What is conditional sale..... 560
—— What varieties possible..... 561, 562
—— What here meant by "conditional sale"..... 563
Validity and form of "conditional sale"..... 564
—— Contract in form absolute shown to be conditional..... 565
—— Express promise to pay does not render absolute..... 566
Construction of such contracts..... 567
—— Declaration of parties not conclusive..... 568
—— Instruments in form of lease held conditional contracts to sell 569–571
—— Instruments in form of lease held sales upon condition subsequent..... 572, 573
—— Instruments in form of lease held absolute sales reserving lien or chattel mortgages..... 574–576
—— Instruments in form of conditional sale held absolute reserving lien or mortgages..... 577–579
—— The rule in Pennsylvania..... 580, 581
—— Bailment and conditional sale distinguished..... 582
—— Conditional sale and chattel mortgage distinguished..... 583
—— The true theory..... 584
On conditional contract to sell no title passes until performance..... 585
—— Note not payment..... 586
Nature of interest acquired by vendee..... 587

References are to sections.

—— Whether assignable or leviable 588
—— Entitled to legal protection 589
—— Performance of condition inures to benefit of transferee 590
Nature of interest retained by vendor 591
—— Interest may be sold, seized, etc 592
—— May assign interest with contract 593
The right of possession 594–596
Condition good against creditors of vendee 597, 598
Condition good against *bona fide* purchaser 599, 600
—— But not where goods bought for resale 601, 602
Statutes requiring filing or recording of contract 603, 604
Default by purchaser — What constitutes 605
Effect of vendee's default 606–608
Waiver of default by seller 609–612
Remedies of seller upon default 613, 614
What choice offered 615
Election of remedy 616
—— Rescission 617
—— Recaption 618
—— Personal action 619
Does recovery of goods bar action for price? 620–623
—— Waiver by vendor of right to retake property 624
Vendee usually has no election 625
Vendee's right to take possession on default — Entry on premises — License 626, 627
Necessity of demand before recovery 628
Return of payments if property retaken by seller 629
—— Equities of purchaser 630
—— How when action against third person 631
—— Return of notes received 632, 633
Destruction of property before payment 634, 635
Additions to or increase of property before payment 636
—— Additions to stock of goods sold 637
Changes in form or nature of property 638–641
Accession and confusion of goods 642
Substitution of goods 643
Effect of annexing goods to land 644–647
Conflict of laws 648–650

V. Contracts of Sale Subject to Other Conditions.

In general 651

1. *Sale of Goods "to Arrive."*

Such contracts conditioned on arrival of the goods 652
Contracts limiting time of shipment 653

References are to sections.

Giving notice of name of ship..... 654
Classification of cases..... 655

2. *Sale of Goods "to be Shipped."*

Such contracts conditional..... 656

3. *Sale on Approval.*

Sale if goods are approved..... 657
Title and risk pending approval..... 658
Within what time option to be exercised..... 659
Effect of failure to return within time fixed..... 660
Necessity for notice of disapproval..... 661
How notice to be given..... 662

4. *Sale if Goods Satisfactory to Buyer.*

Sale if buyer satisfied..... 663
Who to be satisfied..... 664
If buyer not satisfied, no sale..... 665
Reasons for his dissatisfaction..... 666
Duty to test goods..... 667
Duty to act in good faith..... 668
Within what time decision to be made..... 669
Duty to give notice or return..... 670
How buyer's satisfaction indicated..... 671

5. *Sale if Goods Approved by Third Person.*

No sale unless goods approved..... 672
Third person must act in good faith..... 673

6. *Sale of Goods to be Appraised.*

Title does not pass until appraisal..... 674

7. *Sale or Return.*

Sale with option to return or pay..... 675, 676
Nature of title acquired by vendee — Risk of loss..... 677
Option usually vendee's only — Security of seller..... 678
—— Stipulations reserving title..... 679
Form of option..... 680
Within what time option exercised..... 681
Effect of not returning in time prescribed..... 682
How, when buyer puts it out of his power to return..... 683
How, when return becomes impossible..... 684
How return effected..... 685

8. *Sale with Option in Vendee to Retake.*

Title in vendee until option exercised..... 686
Waiver of option..... 687

References are to sections.

9. *Sale with Right in Vendee to Repurchase.*

Title in vendee until right exercised 688
Such contracts strictly construed 689
Within what time right exercised 690
Interests in goods before repurchase 691

10. *Sale to be Void if Vendor Pays.*

Such contracts valid 692

11. *Sale to be Void if Vendee Does Not Pay.*

Such contracts valid 693

CHAPTER IV.

OF CONTRACTS RESPECTING EXISTING CHATTELS NOT YET IDENTIFIED.

Purpose of this chapter 694

I. Contracts for Sale of Portion of Ascertained Mass.

Before title can pass the goods must be ascertained 695
Method of identification immaterial 696
Contracts respecting part of a mass of unequal constituents 697
—— These cases form class by themselves 698
—— Essential features of cases of this class 699–702
—— How when whole mass delivered to vendee 703
Contracts respecting part of a mass of like constituents 704
—— Intention material 705
—— Usage may affect 706
—— How question affected by usage 707–709
How when no usage governs 710
—— *Kimberly v. Patchin* as a type 711, 712
—— Cases holding separation necessary 713
—— *Scudder v. Worster* as a type 714, 715
—— The weight of authority 716, 717

II. Contracts for Sale of Goods of Certain Kind but Goods Not Yet Identified.

Nature of subject 718
Under what circumstances question arises 719
What to be included here 720

1. *Of Appropriation in General.*

General necessity for appropriation 721
What meant by appropriation 722
Who interested in question 723
Who may make the appropriation 724, 725
What constitutes appropriation in general 726
—— Appropriation consists of acts, not mere intention 727

References are to sections.

—— Acts must be in fulfillment of contract 728
Assent to the appropriation 729
—— Buyer's assent made necessary by terms of contract 730
—— Buyer's assent required by implication — Sale by sample 731
—— How buyer's assent given when required 732

2. *Of Appropriation when Seller is to Deliver Goods.*

How when seller is to select and deliver the goods 733

3. *Of Appropriation where Buyer is to Come for Goods.*

How when buyer is to come and get the goods 734
—— Effect of putting goods into buyer's conveyance 735

4. *Of Appropriation where Seller is to Send Goods by Carrier.*

How when seller is to send goods by carrier 736–739
Intention governs 740
—— Payment of freight as evidence 741
—— Agreement that goods shall not be paid for unless they arrive 742
—— Further of the intention 743–745
Goods must be sent in conformity with order 746
Due care must be used in shipping 747
—— Remedy over against carrier must be preserved 748
—— Duty to insure 749
What constitutes delivery to the carrier 750

5. *Of Appropriation where Goods Consigned on Account of Previous Advances.*

How when goods consigned on account of previous advances 751, 752

CHAPTER V.

OF CONTRACTS RESPECTING GOODS TO BE MANUFACTURED OR GROWN.

Purpose of this chapter 753

I. Where Goods are to be Manufactured.

Title ordinarily does not pass until goods are completed and tendered. 754
—— Title does not pass during progress of work 755
—— Especially if yet to be separated from larger mass 756
Same rule where goods to be manufactured and shipped 757
—— Goods must correspond with order 758
Title may pass sooner if such appears to have been intention 759
—— Even without actual delivery 760
When title passes to article designed for, but not annexed to, another. 761
—— Articles to be supplied as repairs or alteration of chattel 762

II. Where Goods are to be Grown.

Title passes when chattel grown and appropriated 763–765

References are to sections.

CHAPTER VI.

OF THE RESERVATION OF THE JUS DISPONENDI.

Purpose of this chapter 766, 767
—— Distinctions 768
Sending goods by carrier not an appropriation if seller retains power of disposal 769
—— Methods adopted 770
—— Choice of methods 771–773
Bill of lading taken to seller's order 774–776
—— Purpose and effect 777, 778
Bill of lading to seller's order attached to draft on buyer 779
—— Buyer obtaining possession without payment 780
—— Custom does not affect 781
Sending invoice, etc., to buyer does not affect 782
—— The rules stated 783–786
—— *Resumé* of English cases 787
Bill of lading consigning goods to buyer 788, 789
Transfer of bill of lading during transit 790–792
How when goods sent C. O. D. 793, 794
How when goods to be delivered F. O. B. 795–797

VOLUME II.

BOOK III.

OF THE AVOIDANCE OF THE CONTRACT.

CHAPTER I.

PURPOSE AND SCOPE OF BOOK III.

Nature of the subjects here considered 798
What subjects included 799
How classified 800

CHAPTER II.

OF AVOIDANCE OF THE CONTRACT BY CONSENT OF PARTIES.

In general 801, 802

I. Termination of Contract by Subsequent Mutual Consent.

Contract may be discharged by agreement 803
—— Executory contracts 804

References are to sections.

—— Executed contracts 805
Substitution of a new contract 806
—— Intention must be clear 807
Introduction of new parties 808
Formalities of rescission — Delivery 809
One party alone cannot rescind — Breach of contract acquiesced in, as a rescission 810, 811

II. Termination of the Contract in Pursuance of the Original Agreement.

Parties may stipulate for subsequent termination 812
Right may be reserved to terminate for any cause 813
—— Or may be limited to particular cause or event 814
—— Or may be limited as to time and manner 815
Usually no rescission of executed sale for mere breach of warranty — Allowed in some States 816–819
May be rescission for fraudulent warranty 820
Contract may provide for rescission for mere breach of warranty 821
—— Rescission for breach of warranty on sale of implements 822
—— Form 823
—— Conditions 824
—— Unless waived, conditions precedent 825
Rescission for non-payment of price 826, 827

CHAPTER III.

OF AVOIDANCE OF THE CONTRACT FOR FAILURE OF CONSIDERATION.

Of the nature of the objection in general 828, 829

I. As a Defense to the Buyer.

In what cases applicable as defense to buyer 830
How in case goods not delivered at all, or in part only, or were not such as buyer bound to accept 831
How when article received of no value — *Caveat emptor* 832, 833
How on sale of invalid patent 834
How in sales of commercial instruments 835
How on sale of goods to which the seller had no title 836
How in case goods conditionally sold are retaken by seller 837

II. As Ground of Action by the Buyer.

Buyer may have action to recover price paid without consideration 838, 839

CHAPTER IV.

OF AVOIDANCE OF THE CONTRACT FOR MISTAKE.

Purpose of this chapter 840
Kinds of mistake involved 841

References are to sections.

Mistake which would prevent formation will justify avoidance..... 842
Mistake as to quality of thing sold..... 843, 844
—— 1. Mistake of buyer as to quality, seller being ignorant of that mistake..... 845, 846
—— 2. Mistake of buyer as to quality, seller knowing of that mistake 847
—— 3. Mistake of buyer as to quality promised, seller not knowing of that mistake..... 848
—— 4. Mistake of one party as to quality promised by the other known to the latter..... 849, 850
Further as to mistake of quality 851, 852
—— Same rule in equity 853
Effect of the mistake..... 854

CHAPTER V.

OF THE AVOIDANCE OF THE CONTRACT FOR INNOCENT MISREPRESENTATION.

What here meant by misrepresentation..... 855
How misrepresentation to be distinguished from fraud 856, 857
How representation to be distinguished from a term of the contract . 858
—— Illustrations..... 859, 860
—— Importance of distinction..... 861
—— Question for the jury 862
Effect of innocent misrepresentation..... 863
Innocent misrepresentation rendered fraudulent by knowingly retaining its fruits..... 864

CHAPTER VI.

OF THE AVOIDANCE OF THE CONTRACT FOR FRAUD.

Purpose of this chapter 865

I. Of Fraud in General.

Definition of fraud..... 866
Must be false representation 867
—— Whether concealment of truth equivalent..... 868
—— Concealment of latent defects..... 869
Must be present representation and not mere promise as to future.... 870
Must be representation as to facts and not mere expression of opinion 871
Must be representation of facts and not of law..... 872, 873
Representation must be material..... 874
Representation must have been made with knowledge of its falsity or without belief in its truth..... 875
—— Derry v. Peek..... 876

References are to sections.

Representation must have been made to be acted upon by injured party ... 877, 878
Party complaining must have been deceived by the representation 879, 880
—— Right to rely on representation ... 881–883
Misrepresentation must have caused proximate injury ... 884, 885

II. Of Fraud upon the Seller.

Forms of fraud ... 886
Fraudulent personation ... 887, 888
Possession fraudulently obtained ... 889
Fraudulently disposing of goods conditionally delivered ... 890, 891
Misrepresentation by buyer as to his solvency or ability to pay ... 892, 893
—— Representations to agents — "Commercial agencies" ... 894, 895
—— How long may be relied upon — Duty to notify of change ... 896
—— Statement made by agency on its own information — Material alterations of dealer's statement ... 897
—— Representation must have been relied upon ... 898
Other false representations inducing sale ... 899, 900
Buying goods not intending to pay for them ... 901, 902
—— Intention not to pay coupled with insolvency ... 903
—— Cause for rescission distinct from false representations ... 904
—— Intention, how determined ... 905
—— Concealment of insolvency or inability to pay not enough ... 906
Remedies of the seller ... 907
Election of remedy — Reasonable time ... 908
—— Evidence of election ... 909
—— Bringing action for deceit ... 910
—— Election to rescind bars personal remedy ... 911
Must rescind *in toto* — Rescission as to term of credit only ... 912
—— Rescission as to mode of payment only ... 913
Must restore consideration ... 914
—— Note of vendee or a stranger ... 915
—— Things of no value ... 916
—— When defendant not interested ... 917
—— Restoration impossible — Goods damaged or partly sold ... 918
—— Restoration in actions of trover ... 919
—— Restoration waived ... 920
Keeping tender of restoration open ... 921
Who may rescind ... 922
Against what parties rescission had — Any one not *bona fide* purchaser for value ... 923
—— Assignees, mortgagees, creditors, etc ... 924
Following proceeds as a trust fund ... 925–927
Necessity of demand before action ... 928, 929

References are to sections.

III. Of Fraud upon the Buyer.

Methods of defrauding 930
Misrepresentations concerning title 931
Misrepresentation concerning quality 932
—— Buying "with all faults" 933
—— Misrepresentations must have deceived buyer 934
Concealment of latent defect 935
Representations as to value 936
—— Market value 937
Representation as to quantity 938, 939
Remedies of the buyer 940
—— Must restore article 941
—— Must act promptly 942

IV. Of Fraud upon Creditors.

In general 943
The statutory provisions 944
—— Declaratory of common-law rules 945
—— Transactions voidable, not void 946
Sales to defeat creditors usually valid between the parties 947, 948
Basis and extent of creditors' right to interfere 949, 950
What dispositions obnoxious to the statutes 951
Bona fide conveyances for value cannot be impeached 952
—— Fraud of seller alone not enough 953
—— Inadequacy of consideration 954
—— Considerations other than pecuniary 955
Conveyance subject to secret lien or trust 956
Voluntary conveyances 957
—— Intention of parties 958
—— Relations of parties 959
Retention of possession by seller as badge of fraud 960
—— Regulated by statutes in some States 961
What delivery or change of possession necessary 962
—— Immediate 963
—— Actual 964
—— Continued 965
—— Exclusive 966
—— Sufficiency usually question for jury 967
—— Doubts resolved in favor of creditor or purchaser 968
Who are creditors 969
—— Nature of demand — Contract or tort — In judgment 970
—— Absolute or conditional 971
Existing or subsequent creditors — What conveyances existing creditors may avoid 972

References are to sections.

—— What subsequent creditors may avoid 973
—— Where creditors of both classes 974
—— Subrogation of subsequent to rights of existing creditors 975
—— Creditors with notice 976
Bona fide purchasers from fraudulent grantee 977
Fraudulent conveyance not good as security for amount paid 978

V. Of Fraud upon Subsequent Purchasers.

In general 979
Delivery as a requisite to the transfer of the title 980, 981
—— Reasons for rule 982
Retention of possession by seller as a badge of fraud 983
—— Conclusiveness of presumption 984
—— Statutory provisions 985
What delivery suffices 986
—— Illustrations 987, 988
—— Delivery of documents 989
—— Seller as bailee of buyer 990, 991
Who are purchasers 992

CHAPTER VII.

OF AVOIDANCE OF THE CONTRACT FOR ILLEGALITY.

In general 993
General principles of law applicable 994
Courts will not enforce illegal contract 995
—— Executory and executed 996
—— Reasons 997
Law will not compel rescission 998
—— Withdrawal from incomplete contract 999
—— Rescission where parties not *in pari delicto* 1000-1002
Agreements partly illegal — Divisible agreements 1003, 1004
Forms of the law creating illegality 1005

I. Illegality at Common Law.

What the common law prohibits 1006
Contract for sale of indecent or immoral thing invalid 1007
—— Knowledge presumed 1008
Contract of sale for immoral or illegal purpose 1009
—— Seller innocent 1010
—— Seller cognizant or participating 1011-1014
—— *Malum prohibitum* or *malum in se* 1015, 1016
—— Degree of participation required 1017-1019
Sales in furtherance of social vices 1020-1022
Sales in furtherance of gambling 1023

References are to sections.

Sales in aid of the public enemy..... 1024, 1025
Sales in violation of liquor laws..... 1026
—— Conflict of laws..... 1027–1029
Sales promotive of wagering speculation..... 1030–1032
—— Legitimate speculation..... 1033–1035
—— Form of contract immaterial..... 1036
—— Mere agreement to repurchase unobjectionable..... 1037
—— Or that vendee has option as to quantity..... 1038
—— Effect upon rights of brokers and other agents..... 1039
Sales in furtherance of unlawful combinations..... 1040
Sales designed to impose upon the public..... 1041
Sales of public office..... 1042
Lex loci..... 1043

II. Invalidity by Statute.

What enactments render sale void..... 1044, 1045
—— Further of construction..... 1046, 1047
—— Repeal of statute..... 1048
—— Illustrations of effect..... 1049–1051
Sunday sales — Statutes forbidding..... 1052
—— Their effect..... 1053–1056
—— Ratification of Sunday sales..... 1057
—— Consideration required..... 1058
—— Conflict of laws..... 1059

BOOK IV.

OF THE PERFORMANCE OF THE CONTRACT.

CHAPTER I.

OF PERFORMANCE IN GENERAL.

In general..... 1060

I. When Performance is Due.

How this question determined..... 1061
When contract silent, circumstances must determine..... 1062, 1063
Distinguishing between condition precedent and mere agreement 1064, 1065
By whom determined..... 1066
Rules for determining..... 1067, 1068

II. What Will Excuse Performance.

In general..... 1069

References are to sections.

1. *Waiver of Performance.*

Party entitled may waive performance 1070
Elements of a waiver 1071
—— Mere silence not a waiver 1072
—— Mere leniency no waiver 1073
—— Friendly attempts at adjustment no waiver 1074
Acceptance of part performance as waiver 1075, 1076
Statement of some objections as a waiver of others 1077
Voluntary and unconditional acceptance of deficient performance a waiver 1078, 1079
—— Where performance due is in instalments 1080

2. *That the Other Party is in Default.*

Default of one party as excuse for non-performance by the other 1081
—— Buyers failing to come or send for the goods 1082
—— Part performance only of entire contract 1083
—— Contemporaneous acts — Default in payment 1084–1086

3. *Renunciation of Contract.*

Renunciation of contract by one party will excuse performance by the other 1087
Rights of one party when the other renounces 1088, 1089
—— Retraction of renunciation 1090
Stopping performance of executory contract 1091, 1092

4. *That the Buyer has Become Insolvent.*

When buyer on credit becomes insolvent, seller may decline to perform 1093–1095

5. *That the Other Party is Unable to Perform.*

Buyer may repudiate where seller unable to convey title 1096

6. *That the Other Party has Disabled Himself to Perform.*

Effect of disabling one's self to perform 1097

7. *Impossibility of Performance.*

In general 1098
Legal impossibility excuses 1099
Physical impossibility excuses 1100–1102
Mere inability of party does not excuse 1103, 1104
Unexpected expense does not excuse 1105

8. *Prevention of Performance.*

Prevention by one party equivalent to performance by the other 1106
—— After part performance 1107

References are to sections.

III. What Constitutes Performance.

In general 1108

1. *Performance by the Seller.*

Of performance by the seller in general 1109

2. *Performance by the Buyer.*

Of performance by the buyer in general 1110

CHAPTER II.

OF THE TRANSFER OF THE TITLE BY THE SELLER.

Necessity of the transfer 1111
What constitutes the transfer 1112
Evidence of the transfer — Bill of sale 1113, 1114
Duty of the seller 1115

CHAPTER III.

OF THE DELIVERY OF THE GOODS.

Of the seller's duty to deliver possession 1116
What is here meant by delivery 1117

1. *The Obligation to Deliver.*

The obligation to deliver 1118
Delivery usually to be concurrent with payment 1119–1121
Conditions precedent to delivery — Notice of readiness to deliver or receive 1122, 1123

2. *The Place of Delivery.*

When no place specified, delivery to be where goods were at time of sale 1124
Where time is fixed but not the place 1125
Where the place is fixed but not the time 1126
Where place at option of one party 1127
Agreement as to place must be complied with 1128

3. *The Time of Delivery.*

Time of delivery when no time agreed upon — Reasonable time 1129
—— When notice is required 1130
—— Agreement to deliver during indefinite period 1131
—— Reasonable time, how determined 1132, 1133
Delivery where time is agreed upon — Construction of terms 1134
—— Month — Day 1135
—— Computation of time 1136
—— Hour of day 1137
—— Time of the essence of contract 1138

References are to sections.

—— Performance at time a condition precedent..... 1139
Delivery by instalments — Breach of one of successive performances. 1140
—— The English rule..... 1141–1143
—— The rule in the United States..... 1144
—— Norrington v. Wright — Default in delivery..... 1145
—— Pope v. Porter — Default in delivery..... 1146
—— McGrath v. Gegner — Default in payment..... 1147
—— Weight of authority..... 1148–1150
Alterations by consent in time or place of delivery..... 1151, 1152
Résumé of cases..... 1153

4. *The Thing to be Delivered.*

Article delivered must be the article agreed upon..... 1154–1156
Amount delivered must be the amount agreed upon..... 1157
—— Tender of too much — Rejection — Selection..... 1158
—— Excess not charged for..... 1159
—— Waiver of discrepancy..... 1160
—— Tender of too little — Rejection — Acquiescence..... 1161
—— Retention of part delivered — Implied promise to pay therefor.. 1162
—— Severable contract — Recovery for part performance..... 1163, 1164
—— Severable contract — Failure as to part..... 1165
—— Quantity indefinite — "More or less" — "About"..... 1166–1169
—— Quantity indefinite — Option as to quantity — Election.... 1170, 1171

5. *To Whom Delivery is to be Made.*

Must be to buyer or some one who represents him for that purpose... 1172
Delivery to agent sufficient..... 1173
Delivery to one of joint purchasers sufficient..... 1174
Delivery to carrier, when sufficient..... 1175
—— How question arises..... 1176
—— How question determined..... 1177
—— Is matter of agreement — Construction of agreement..... 1178–1180
Undertaking of seller to "send," "ship" or "forward" goods, how satisfied..... 1181
—— Selection of carrier..... 1182
—— Delivery to the carrier must be made with due care..... 1183
Undertaking of seller to deliver the goods, how satisfied..... 1184

6. *What Constitutes Delivery.*

In general..... 1185
Delivery complete when goods properly placed at buyer's disposal... 1186
What acts necessary in ordinary cases..... 1187, 1188
—— Seller in readiness though buyer in default..... 1189
—— Marking and setting aside..... 1190
—— Where goods are on seller's land — License..... 1191
—— Where goods in custody of a third person..... 1192

References are to sections.

—— Where goods in possession of bailee — Attornment 1193
—— Delivery by transfer of bill of lading or warehouse receipt..... 1194
—— Delivery to carriers..... 1195
—— Delivery by carriers..... 1196
—— Delivery where goods are bulky or not capable of manual delivery — Symbolical delivery..... 1197
—— Delivery where goods are retained by seller or bailee of buyer.. 1198
—— Delivery of growing crops..... 1199
—— Delivery of articles situate on land sold..... 1200
—— Delivery of goods on vessel at sea..... 1201
—— Delivery where goods already in possession of buyer..... 1202

CHAPTER IV.

OF PERFORMANCE OF CONDITIONS BY THE SELLER.

In general..... 1203
Performance by seller of express conditions..... 1204
Performance by seller of implied conditions, often called implied warranties..... 1205
Stipulations in executory contracts as conditions..... 1206–1208
Identity of kind a condition precedent..... 1209
Correspondence to description a condition precedent..... 1210
—— Opportunity for inspection..... 1211
Conformity to sample a condition precedent..... 1212
Merchantability a condition precedent..... 1213
Fitness for intended use a condition precedent..... 1214
Time, place and quantity as conditions precedent — Time 1215
—— Quantity 1216
—— Place..... 1217
Difference in legal effect between condition and warranty..... 1218
Condition precedent becoming warranty after acceptance..... 1219, 1220

CHAPTER V.

OF WARRANTY BY THE SELLER.

Purpose of the chapter..... 1221

I. Of Warranty in General.

Warranty defined..... 1222
Is a collateral agreement..... 1223
Warranty to be distinguished from representation..... 1224
—— Illustration of distinction..... 1225
—— What necessary to make representation a warranty..... 1226
—— Further illustration..... 1227
—— Not to be confused with time of warranting..... 1228

References are to sections.

—— How determined 1229
—— How affected by usage 1230
Warranty to be distinguished from condition 1231
Warranty absolute or conditional 1232
Classification of warranties 1233

II. Express Warranties.

Express warranty defined 1234
What constitutes a warranty—Any direct and positive affirmation 1235, 1236
Intention to warrant 1237
—— How determined 1238
—— Motive — Good faith no defense 1239
Reference to other warranties or to printed statements — Warranty by conduct 1240
Mere expression of judgment or opinion not a warranty 1241
—— What questions presented 1242
—— Test for determining 1243
—— Court or jury 1244
—— Mere commendation or "seller's praise" not a warranty 1245, 1246
Consideration for the warranty — Time of making it 1247–1249
Construction of warranties in general 1250
—— Intent governs 1251
—— How words understood 1252
Oral and written warranties 1253
—— Completed writing excludes oral warranty 1254
—— Otherwise of incomplete writing 1255
—— How determined 1256
—— Impeaching writing for fraud 1257
Written contract does not exclude implied warranties 1258
Express warranty as excluding implied warranty 1259
—— When relating to different subject 1260, 1261
Express warranty as excluding usage 1262–1264
Time, duration and place of warranty 1265
—— Warranty as to future event 1266
—— Warranty against future acts of government 1267
Representations concerning soundness in animals 1268
—— Words used 1269
—— What constitutes unsoundness 1270
—— Disease need not be permanent or incurable 1271
Warranty against known defects — Usually none 1272
—— But may be given 1273
—— How determined 1274
Express warranty after inspection 1275
Limitations upon warranty 1276
—— To the extent of seller's knowledge 1277

References are to sections.

Warranties by agents 1278, 1279
Agent's implied authority to warrant title 1280
Agent's implied authority to warrant quality 1281–1283
—— Custom — Judicial notice 1284
—— Customary warranties on sales of machinery 1285, 1286
—— Sale by sample 1287
—— Authority limited to a particular warranty 1288
Limitations upon power to warrant — Unusual warranties 1289–1292
Authority exhausted, when 1293
Authority to warrant soundness of horses 1294

III. Implied Warranties.

Implied warranty defined 1295
Implied warranty when express warranty exists 1296
Time and place of implied warranty 1297
—— Deterioration during shipment 1298
Implied warranties classified 1299

1. *Implied Warranty of Title.*

Under what circumstances a warranty arises in general 1300
—— The English rule 1301
—— The rule in the United States 1302
—— To what classes of goods the rule applies 1303
—— Warranty of title protects against incumbrances 1304
—— Subsequently acquired title inures to benefit of buyer 1305
—— Warranty implied on exchange of property 1306
—— No implied warranty of title in official sales, etc 1307
—— None where seller is known to be mere agent 1308
—— None where circumstances negative the presumption 1309

2. *Implied Warranties of Quality.*

In general 1310

a. Caveat Emptor.

No warranty implied on sale of ascertained chattel open to inspection 1311
—— Mere inconvenience of examination does not affect rule 1312
—— No implied warranty of quality as to obvious defects 1313
—— No implied warranty in such cases even though seller knew that chattel was bought for specific purpose 1314, 1315
—— Or that the defect be latent 1316
—— Unless the seller of goods with latent defects be the manufacturer or grower 1317, 1318
—— No warranty of soundness from payment of sound price 1319

b. Of Conformity to Sample.

On sale by sample, warranty implied that bulk is equal to sample in quality 1320

References are to sections.

—— What constitutes a sale by sample 1321
—— Effect of inspection 1322–1324
—— How question determined 1325
—— Effect of usage 1326
—— Parol evidence 1327
—— Extent of warranty 1328–1330
—— Co-existence of other warranties 1331

c. Genuineness.

Implied warranty of genuineness on sale of bonds, notes, etc 1332

d. Conformity to Description.

Sale by description — The English rule 1333
Sale by description in the United States imports warranty of identity of kind 1334, 1335
—— Description incorporating quality 1336
—— Limits of rule 1337
—— How determined 1338
—— Description coupled with other tests or limitations 1339

e. Merchantability.

Warranty of merchantability arises on executory sale of merchandise 1340
—— What satisfies 1341
—— How when there is express warranty of quality 1342

f. Fitness for Intended Use.

Implied warranty of fitness where goods for particular use 1343, 1344
—— To what sellers the rule applies 1345
—— Extent of the warranty — Latent defects 1346
—— Reasonable fitness 1347
—— Article originally designed for different use — Second-hand goods 1348
—— Warranty not implied where buyer selects the article or a special and ascertained article is ordered 1349
—— Nor where qualities are specified by the buyer 1350
—— Specification by seller 1351
—— Manufacturer warrants kind, materials and workmanship 1352
—— Also that goods are new and of his own make 1353
Warranty of fitness by breeder or grower 1354, 1355

g. Fitness for Food.

Sale by dealer of provisions for consumption by buyer implies warranty of fitness for food 1356
—— How when seller is not dealer 1357
—— Other circumstances raising warranty 1358
No implied warranty of purity of water furnished by water companies 1359, 1360

References are to sections.

CHAPTER VI.

OF PERFORMANCE BY THE PURCHASER.

In general 1361
How subjects classified 1362

CHAPTER VII.

OF ACCEPTANCE BY THE BUYER.

In general 1363
What meant by acceptance 1364
In what cases requisite 1365

1. *Acceptance in Case of Present Sale.*

Acceptance here contemporaneous with contract 1366
Receipt where delivery postponed 1367
Waiver of irregular delivery 1368

2. *Acceptance in Case of Executory Contract.*

Necessity and nature of acceptance here 1369
What is meant by acceptance in these cases 1370, 1371
What buyer is bound to accept 1372
When and where buyer is bound to accept 1373
Waiver of irregular delivery 1374
Buyer's right of inspection before acceptance 1375, 1376
—— Time, place and method of test 1377
—— Right to use or consume goods in test 1378
Express acceptance 1379
Implied acceptance — Retention beyond reasonable time 1380, 1381
—— Retention beyond agreed time 1382
—— Acceptance after test agreed upon — Failure to give notice 1383, 1384
—— Waiver of the notice 1385, 1386
—— Acts of ownership indicating acceptance 1387
Effect of acceptance 1388
—— As waiver of time 1389
—— As waiver of quantity 1390
—— As waiver of quality — 1. Where there was no warranty 1391
—— 2. Where there was implied warranty or condition 1392, 1393
—— 3. Where there was an express warranty 1394, 1395
Effect of acceptance where contract provides that it shall be conclusive 1396
Effect of acceptance when brought about by fraud, mistake or promise to remedy 1397
Effect of acceptance or rejection in part 1398–1401
Rejection — Method and effect 1402, 1403

References are to sections.

CHAPTER VIII.

OF PAYMENT OF THE PRICE.

In general.. 1404

I. When Payment is Due.

Considerations controlling. 1405, 1406
When no term of credit, payment and delivery presumptively contemporaneous 1407
—— Same rule applies to executory contracts... 1408
Where seller is to do something before payment..... 1409
Where term of credit is agreed upon..... 1410
Where credit procured by fraud 1411
Delivery of the goods not necessary 1412–1414
By contract payment may be due before title passes..... 1415
Demand for payment not necessary..... 1416

II. Place of Payment.

When no place of payment specified, debtor must seek creditor..... 1417

III. The Amount to be Paid.

Amount is price agreed upon 1418
Payment of part does not discharge the whole... 1419
—— Exceptions 1420

IV. The Medium of Payment.

Unless otherwise agreed, payment to be in lawful money..... 1421
Money must be genuine..... 1422
Payment by bill or note — Buyer's note presumptively not payment.. 1423
—— Contrary rule in few States..... 1424
—— Note of third person..... 1425
—— Presumptions not conclusive..... 1426
Action upon note or original consideration 1427
—— Extension of time 1428
Acceptance of forged or invalid note 1429
—— Note of insolvent..... 1430
Acceptance of note induced by fraud 1431
Conflict of laws..... 1432
Check or draft as payment.. 1433
—— Certification does not affect.... 1434
—— Burden of proof 1435
—— Dishonored or forged check 1436
Payment in seller's own note or debt..... 1437
—— Set-off..... 1438
Payment in goods 1439–1441
—— If goods not delivered payment due in cash 1442

References are to sections.

IV. To Whom Payment to be Made.

To the seller or his agent 1443

1. *Implied Authority to Receive Payment.*

General considerations 1444
Authority to receive payment not implied from possession of bill 1445
Agent having possession or other *indicia* of ownership may receive payment 1446
Agent to sell merely or to solicit orders, without possession of goods, not authorized to receive payment 1447
When traveling salesmen may receive payment 1448
—— When payment to agent part of terms 1449
—— Notice of want of authority 1450
How, when agency unknown 1451, 1452
When authority to receive payment implied from possession of securities 1453
Whether authority to receive payment implied from relation of parties — Husband and wife — Parent and child 1454

2. *Construction of the Authority.*

Can receive nothing but money 1455
No authority to release or compromise the debt 1456
May receive part payment 1457
But may not extend time 1458
Not authorized to receive before due 1459
No authority to take checks 1460
If authorized to take check or note, has no authority to indorse and collect it 1461
Authority to collect does not authorize sale 1462
No authority to deal with funds collected 1463
May give receipt or discharge 1464

VI. By Whom Payment to be Made.

By purchaser or his agent 1465
By stranger 1466, 1467

BOOK V.

OF REMEDIES FOR NON-PERFORMANCE.

CHAPTER I.

PURPOSE OF BOOK V.

In general 1468
How remedies classified 1469

References are to sections.

CHAPTER II.

OF THE REMEDIES OF THE SELLER AGAINST THE GOODS.

In general 1470–1472

I. The Seller's Lien.

What here included 1473

1. *Of the Lien in General.*

Seller has a lien to secure payment 1474
What the lien secures 1475
What claims the lien precedes 1476

2. *Waiver or Abandonment of the Lien.*

Waiver of the lien — Expressly or by implication 1477, 1478
—— Waiver by giving credit 1479, 1480
—— Waiver by taking bill or note 1481
Lien abandoned by unconditional delivery 1482–1484
—— Lien not lost by delivery which passes the title but does not change possession 1485, 1486
—— So lien not lost if possession retained, though seller's attitude has changed 1487
—— Lien not lost by special and qualified delivery 1488, 1489
—— Lien not lost if possession secured by fraud 1490
—— How when goods already in possession of buyer 1491
—— How when buyer has changed character of property 1492
—— How when goods in possession of bailee 1493, 1494
—— How when goods on public wharf or the premises of a stranger .. 1495
—— How when goods are delivered to a carrier 1496, 1497
—— Transfer by bill of lading 1498
Effect of delivery of part of the goods 1499
Effect of part payment 1500

3. *Estoppel in Favor of Sub-purchasers.*

Lien good against sub-purchaser unless seller estopped — Estoppel by conduct 1501–1503
—— Form of delivery order or warrant as estoppel 1504–1506
—— Warehouse receipts in the United States 1507

4. *Revival of Lien on Insolvency of Purchaser.*

Revival of lien — Insolvency of purchaser before actual delivery 1508, 1509
Insolvency of buyer before expiration of credit 1510, 1511
—— Insolvency of buyer before delivery order complied with ... 1512–1514
—— Same subject — Taking note — Giving receipted bill, etc ... 1515–1517
—— Same subject — Instalment delivery — Subsequent appropriation 1518
—— What constitutes insolvency 1519, 1520

References are to sections.

5. *Revival of Lien on Expiration of Credit.*

Lien revives on expiration of credit 1521

6. *Effect of Tender of Price.*

Lien lost by tender of price 1522

7. *Effect of Claiming Lien.*

Claim of lien does not rescind sale 1523

II. The Seller's Right of Stoppage in Transitu.

What here included 1524

1. *The General Nature of the Right.*

The origin and nature of the right 1525, 1526
Exists only when title has passed 1527
Right favored in the law 1528

2. *Who May Stop the Goods.*

Right may be exercised only by vendor or one in his position 1529
By factor who has bought goods for principal 1530
By person who pays price for vendee 1531
But not by vendor of seller 1532
Nor by unpaid agent of seller 1533
Principal who has consigned goods to factor may stop 1534
Surety for the buyer may not stop the goods 1535
Seller of executory interest may exercise the right 1536
Stoppage by agent for his principal — Ratification 1537

3. *Against Whom Stoppage May be Effected.*

Against buyer or one standing in his attitude 1538
Only against an insolvent buyer 1539
—— Evidence of insolvency 1540
—— Absconding, attachment, etc., not enough 1541
—— Insolvent when 1542–1544

4. *Under What Conditions Stoppage May be Effected.*

Goods can be stopped only while in transit 1545, 1546
Existence of a transit — Goods transported on ship or other vehicle owned or chartered by purchaser 1547
—— Shipment on vessel owned by buyer 1548
—— Shipment on vessel chartered by buyer 1549
Same subject — Reserving control 1550
—— Shipment by carrier designated by the buyer 1551
—— Shipment through purchasing agent of buyer 1552
How long the transit continues — In general 1553–1555
Buyer may intercept the goods 1556
—— Is carrier's consent necessary 1557

References are to sections.

Interception by buyer's agent — Agent to receive or forward.. . 1558–1561
Interception by sub-purchaser — Mere resale does not defeat stoppage 1562
Indorsement of bill of lading..... 1563–1567
—— Pledgee of goods — Bill of lading as security..... 1568
—— Absolute sale of goods, but purchase price unpaid — Right to reach proceeds 1569, 1570
Interception by buyer's creditors — Attachment — Garnishment..... 1571
Interception by seller as a creditor — Attachment by seller..... 1572
When transit ends — Arrival at destination 1573–1577
—— Goods not yet unloaded 1578
—— Goods in carrier's or other warehouse — Attornment 1579, 1580
—— Carrier as bailee for buyer..... 1581–1583
—— Deposit of goods in custom-house..... 1584–1587
—— Goods in hands of local truckman..... 1588–1590
—— How, when consignee refuses to receive goods 1591, 1592
Who may take possession for vendee — Agent 1593
—— Administrator — Assignee..... 1594
—— Not sheriff..... 1595
—— Or mortgagee..... 1596
Actual or constructive possession by purchaser..... 1597–1601
Effect of part delivery..... 1602
Effect of part payment 1603
—— Effect of taking note 1604

5. *How Stoppage May be Effected.*

No particular method necessary — Notice to stop..... 1605–1607
To whom notice to stop should be given — Vendee..... 1608
—— Carrier's agent..... 1609
Carrier's lien must be satisfied..... 1610

6. *Effect of Stopping the Goods.*

Restores right of possession..... 1611
Does not rescind the sale..... 1612
Remedy of seller to secure payment. 1613

III. Seller's Right of Stoppage on Executory Sale.

Nature of this right..... 1614–1616
How right exercised — Its effect..... 1617

IV. Option of Seller as to Remedies.

What remedies seller may pursue..... 1618, 1619
Equitable remedies..... 1620

V. The Seller's Right of Resale.

How here considered. 1621

References are to sections.

1. *When Title has Passed.*

In general 1622, 1623
To what kinds of property right of resale attaches 1624
When right may be exercised 1625
—— Duty to hold goods until price due 1626, 1627
—— Buyer's right to redeem the goods 1628
Seller as agent of the buyer 1629, 1630
Buyer as agent of seller 1631
Notice of resale 1632
—— 1. Notice of seller's purpose to resell 1633-1636
—— 2. Notice of time and place of resale 1637
Place of resale 1638, 1639
The manner of resale 1640, 1641
Time of resale 1642
Effect of resale in determining value 1643
Title of the purchaser at the resale 1644

2. *Right of Resale on Executory Contract.*

General considerations 1645, 1646
Choice of remedies 1647, 1648
Nature of right of resale 1649
How resale should be made 1650

CHAPTER III.

REMEDIES OF THE SELLER AGAINST THE BUYER PERSONALLY.

Purpose of this chapter 1651
What questions arise 1652

I. Where the Title has Passed.

In general 1653

1. *Where the Goods have been Delivered.*

Recovery of price the chief object 1654
Seller cannot rescind for mere non-payment of price 1655
—— May rescind for fraud 1656
—— May reserve lien by contract 1657
Seller may recover price as for goods sold and delivered 1658
—— When credit given 1659
—— When no credit given 1660
When payment of price is due — On delivery 1661, 1662
—— At expiration of term of credit 1663
—— How when bill or note was to be given for the price 1664
Actual delivery and acceptance necessary to sustain count for goods sold and delivered 1665
Actions for deceit 1666

References are to sections.

2. *Where the Goods have not been Delivered.*

Title passing though goods not delivered 1667
Recovery of price where seller yet to do something to the goods 1668
Recovery of price where seller holds as bailee for buyer..... 1669
Recovery of price where seller claims his lien 1670, 1671
Recovery of price where seller stops goods in transit..... 1672
Recovery of residue of price after resale in pursuance of lien..... 1673
Recovery of price where buyer fails or refuses to take the goods 1674–1677
—— Other remedies in like cases..... 1678, 1679
—— Vendor may resell and recover deficiency..... 1680
—— Right to keep property as his own and recover deficiency .. 1681, 1682

II. WHERE THE TITLE HAD NOT PASSED.

In general..... 1683

1. *Where the Goods have been Delivered.*

Recovery of goods and damages for breach of contract..... 1684–1688

2. *Where the Goods have not been Delivered.*

Where title has not passed and goods not delivered, action for damages is remedy..... 1689
Measure of damages usually difference between contract price and market price at time and place of delivery..... 1690
—— Time for delivery..... 1691
—— How market value shown — Resale..... 1692
—— Scope of evidence..... 1693
Full contract price after tender allowed in some cases..... 1694
—— Contracts for sale of stocks..... 1695
—— Contracts for manufacture of chattel..... 1696
—— Contracts for production of that which has no market value.... 1697
—— This not the general rule..... 1698
Countermanding performance of executory contract..... 1699
—— Countermanding order after part delivery..... 1700
—— Countermanding order for goods when partly manufactured..... 1701
—— Countermanding order before manufacture begun..... 1702, 1703
—— Loss of profits..... 1704
—— Form of repudiation..... 1705
Effect on seller's rights of repudiation by the buyer..... 1706
—— Seller not obliged to treat it as a present breach. 1707
—— Contract kept alive for the benefit of both parties..... 1708
—— Measure of damages if seller does treat it as present breach. 1709–1712
Treating contract as rescinded and recovering *quantum valebat*..... 1713

CHAPTER IV.

OF THE REMEDIES OF THE BUYER AGAINST THE SELLER.

Purpose of this chapter..... 1714
How subjects classified..... 1715

References are to sections.

I. Where the Title has not Passed.

In general 1716

1. *Where the Goods have not been Delivered.*

Seller's breach of contract to sell and convey 1717
Specific performance not usually awarded 1718
—— Where chattel is unique 1719
—— Where chattel of peculiar importance 1720–1723
—— Where legal remedy inadequate 1724
—— Where chattel necessary to enjoyment of estate 1725
—— Contracts for sale and delivery in instalments 1726
—— Contracts for sale of corporate stocks and bonds 1727, 1728
—— Contracts for sale of inventions, patents or patented articles 1729
—— Contracts for sale of debts, notes, etc 1730
—— Contracts for sale of growing trees 1731
—— Specific performance not to be made substitute for damages 1732
—— Will not be granted where contract ambiguous, uncertain or unfair 1733
Action at law for damages the usual remedy 1734, 1735
Measure of damages usually difference between contract price and value of goods at time and place of delivery 1736–1740
—— How, when price paid in advance 1741
—— How, when no market at place of delivery 1742
—— How, when goods have no market value 1743
—— How, when goods have neither market nor actual value 1744
—— How, when no difference between contract price and market value 1745
—— How, when goods to be delivered in instalments 1746
—— How, when goods to be delivered "on or before" a certain day .. 1747
—— How, when no time fixed for delivery 1748
—— How, when delivery postponed at seller's request 1749
—— How, when seller repudiates before time for performance ... 1750–1753
—— How, when seller refuses to give credit as agreed 1754, 1755
Measure of damages where special circumstances were in contemplation 1756
—— General rule of damages for breach of contract — Hadley v. Baxendale 1757–1759
How the rule applies to sales 1760
Loss of profits on resale contracted for 1761
—— Resale not contemplated 1762
—— Resale known to vendor 1763–1765
—— Extent of knowledge required — Particular price 1766, 1767
—— Cost of procuring substitute 1768
—— Costs of defending action brought by sub-vendee 1769
—— Summary of English cases 1770
Measure of damages where goods intended for particular use ... 1771–1776

References are to sections.

No damages for speculative or remote losses..... 1777-1779
Pleading special damages 1780

2. *Where the Goods have been Delivered.*

Substantially same remedies as in preceding cases 1781

II. WHERE THE TITLE HAS PASSED.

In general..... 1782

1. *Where the Goods are not Delivered.*

Specific performance of agreement to deliver..... 1783
Action for damages for breach of agreement to deliver 1784
—— Measure of damages.... 1785
Trover—Measure of damages 1786
—— How when goods of fluctuating value—Stocks, bonds, etc.. 1787, 1788

2. *Where the Goods have been Delivered.*

What questions arise..... 1789

a. Where there was Delay in Delivery.

Measure of damages for delay..... 1790-1792

b. Where Title Fails in Whole or in Part.

Recovery of consideration..... 1793
Damages for breach of warranty of title..... 1794
—— When right of action accrues..... 1795
—— What constitutes eviction..... 1796
—— Warranty broken by incumbrances..... 1797
—— Evidence of eviction—Judgment—Costs of suit..... .. 1798

c. Where Goods Defective in Kind, Quality or Condition.

In general..... 1799
Caveat emptor..... 1800
Express stipulation for return or other remedy..... 1801
Rejection of goods..... 1802, 1803
Rescission for fraud..... 1804
Rescission of breach of warranty..... 1805
—— In pursuance of agreement..... 1806
—— Waiver of special remedy—Suit for breach of warranty..... 1807
—— Option where law gives right to rescind 1808
Action for breach of warranty 1809
What form of action—Contract or tort?..... 1810
Notice of defect—Offer to return..... 1811
—— Conditional warranty 1812, 1813
Vendee not bound to anticipate or search for defects 1814
Who liable for breach of warranty—Principal—Agent..... 1815
—— Purchaser of draft with bill of lading attached 1816

References are to sections.

Measure of damages for breach of warranty — In general..... 1817, 1818
—— Time..... 1819
—— Place..... 1820
Measure of damages for breach of warranty when goods bought for special purpose..... 1821
—— Damages for losses incidental to use or purpose contemplated 1822–1825
—— Expenses incurred..... 1826
—— Gains prevented..... 1827, 1828
—— Purely speculative profits..... 1829–1831
—— Losses not contemplated..... 1832
Measure of damages where goods bought to be resold..... 1833
—— Damages paid sub-vendee for breach of same warranty 1834
Buyer may recover for breach of warranty though he has not paid the price..... 1835
—— Or though he has paid the price..... 1836
—— Or though he may have resold the goods..... 1837
—— Or though he may have made a profit on them..... 1838
Remedies for deceit or fraud..... 1839
—— Elements of fraud..... 1840
—— Reliance on representations..... 1841
—— Representations must have been proximate cause of injury..... 1842
—— Measure of damages..... 1843
Buyer may recoup damages in action by seller for the price..... 1844
Defense of failure of consideration..... 1845–1847
Recovery as for failure of consideration..... 1848–1850

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Abbott v. Goodwin (37 Me. 203), 1050.
Abbott v. Hapgood (150 Mass. 248), 1774.
Abbott v. Reeves (49 Pa. St. 494), 1727.
Abbott v. Shepard (48 N. H. 14), 247, 251, 428.
Aborn v. Merchants' Despatch Transportation Co. (135 Mass. 283), 269.
Abrahams v. Weiller (87 Ill. 179), 1447.
Accumulator Co. v. Dubuque St. Ry. Co. (27 U. S. App. 364), 1822, 1826.
Acebal v. Levy (10 Bing. 376), 207, 208, 370, 438, 448.
Acker v. Campbell (23 Wend. 372), 928, 1437.
Acker v. Kimmie (37 Kan. 276), 823.
Acraman v. Morris (8 C. B. 449), 508.
Adams v. Ames (19 Wash. 425), 1103.
Adams v. Beall (67 Md. 53), 107.
Adams v. Berg (67 Miss. 175), 599, 603.
Adams v. Coulliard (102 Mass. 167), 1013, 1018, 1027.
Adams v. Dale (29 Ind. 273), 1136.
Adams v. Foley (4 Iowa, 44), 166.
Adams v. Fraser (49 U. S. App. 481), 175.
Adams v. Frazer (82 Fed. R. 211), 1447.
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Adams v. Hamell (2 Doug. 73), 1053, 1054.
Adams v. Johnson (15 Ill. 345), 1237, 1245.
Adams v. Lindsell (1 Barn. & Ald. 681), 244, 247, 251, 252.
Adams v. Messinger (147 Mass. 185), 1729.
Adams v. McMillan (7 Port. 73), 438, 461.
Adams v. O'Connor (100 Mass. 515), 543, 1437.
Adams v. Roscoe Lumber Co. (159 N. Y. 176), 546, 555.
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Adams v. Wordley (1 M. & W. 374), 1264.
Adams Mining Co. v. Senter (26 Mich. 73), 390, 392, 526.
Adams Radiator Works v. Schnader (155 Pa. St. 394), 664.
Aderholt v. Embry (78 Ala. 185), 711.
Adie v. Clark (L. R. 3 Ch. Div. 134) 834.
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Adler v. Thorp (102 Wis. 70), 901.
Adler v. Wagner (47 Mo. App. 25) 1174.
Adrian v. Lane (13 S. C. 183), 175.
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Ager v. Duncan (50 Cal. 325), 947.
Agins v. Great Western Colliery Co. (1 Q. B. 413), 1769.
Agnew v. Dumas (64 Vt. 147), 365.
Aguirre v. Allen (10 Barb. 74), 466.
Aguirre v. Parmelee (22 Conn. 473), 1552.
Ahearn v. Ayres (38 Mich. 692), 222.
Ahern v. Baker (34 Minn. 98), 257.
Ahern v. Goodspeed (72 N. Y. 108), 1281, 1282, 1284.
Aiken v. Blaisdell (41 Vt. 655), 1013, 1019, 1027, 1044, 1046, 1051.
Aiken v. Hyde (99 Mass. 183), 667.
Akerman v. Humphrey (1 Carr. & P. 53), 1566.
Akin v. Jones (93 Tenn. 353), 49.
Albany City Savings Institution v. Burdick (87 N. Y. 40), 881.
Albemarle Lumber Co. v. Wilcox (105 N. Y. 34), 205, 213, 485.
Albright v. Griffin (78 Ind. 182), 1429.
Albright v. Meredith (58 Ohio St. 194), 588, 619, 629.
Alden v. Hart (161 Mass. 576), 1340.
Alden v. Wright (47 Minn. 225), 1843.
Alderman v. Eastern R. Co. (115 Mass. 233), 740, 788.
Alderson v. Temple (4 Burr. 2235), 1592.
Alderton v. Buchoz (3 Mich. 322), 382, 383.
Aldrich v. Bailey (132 N. Y. 85), 64, 72.
Aldrich v. Blackston (128 Mass. 143), 1052.
Aldrich v. Grimes (11 N. H. 194), 121.
Aldrich v. Jackson (5 R. I. 218), 835.
Aldrich v. Pyatt (64 Barb. 391), 350.
Aldridge v. Johnson (7 El. & B. 885), 695, 725, 727, 729, 730, 735, 757.
Alexander v. Dutton (58 N. H. 282), 1270.
Alexander v. Gardner (1 Bing. 671), 478, 529, 732, 740.
Alexander v. Gibson (2 Camp. 555), 1281, 1294.
Alexander v. Hutchinson (2 Hawks, 535), 121.
Alexander v. Miller (16 Pa. St. 215), 178.
Alexander v. Oneida Co. (76 Wis. 56), 363.
Alexander v. Swackhamer (105 Ind. 81), 149.
Alexander v. Vanderzee (L. R. 7 C. P. 530), 653.
Alexander v. Worman (6 H. & N. 100), 845.
Alewyn v. Pryor (R. & M. 406), 652.
Alfred Shrimpton & Sons v. Philbrick (53 Minn. 366), 1841.
Allan v. Lake (18 Q. B. 560), 1333.
Allard v. Greasert (61 N. Y. 1), 349, 365.
Allen v. Anderson (3 Humph. 581), 1805.
Allen v. Bennett (3 Taunt. 169), 428, 430, 434, 449.
Allen v. Berryhill (27 Iowa, 534), 72, 74, 82, 83.
Allen v. Delano (55 Me. 113), 636.
Allen v. Duffie (43 Mich. 1), 1052, 1057.
Allen v. Dykers (3 Hill, 593), 1264.
Allen v. Ford (19 Pick. 217), 912, 1411.
Allen v. Gardiner (7 R. I. 22), 1052.
Allen v. Hammond (11 Pet. 63), 199, 274.
Allen v. Hartfield (76 Ill. 358), 1437.
Allen v. Jarvis (20 Conn. 38), 1092, 1106, 1697.
Allen v. Lardner (78 Hun, 603), 132.
Allen v. Maine Central R. Co. (79 Me. 327), 1606, 1607, 1608.
Allen v. Maury (66 Ala. 10), 166, 676.
Allen v. Minor (2 Call, 70), 124.
Allen v. Pearce (84 Ga. 606), 1004, 1050.
Allen v. Pink (4 M. & W. 140), 448, 1255.

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Allis v. Billing (6 Met. 415), 72, 77.
Allis v. McLean (48 Mich. 428), 1831.
Allis v. Nininger (25 Minn. 525), 1798.
Allman v. Davis (2 Ired. 12), 508.
Allshouse v. Ramsay (6 Whart. 331), 1417.
Allyn v. Willis (65 Tex. 65), 1572.
Alpha Check-Rower Co. v. Bradley (105 Iowa, 537), 49, 1259, 1829.
Alpha Mills v. Watertown Co. (116 N. C. 797), 1815.
Alt v. Grosclose (61 Mo. App. 409), 336.
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American Extract Co. v. Ryan (104 Ala. 267), 1129.
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American Hoist & Derrick Co. v. Johnson (114 Mich. 172), 1154.
American Mortgage Co. v. Wright (101 Ala. 658), 102.
American Oak Leather Co. v. Porter (94 Iowa, 117), 426, 445.
American Sugar Refining Co. v. Fancher (145 N. Y. 552), 925.
American White Bronze Co. v. Gillette (88 Mich. 231), 811, 1156.
Ames, Ex parte (1 Low. 561), 636.
Ames v. Drew (31 N. H. 475), 1462.
Ames v. Jones (77 N. Y. 614), 1321.
Ames v. Moir (130 Ill. 582), 1618, 1682.
Ames v. Quimby (96 U. S. 324), 210.
Ames v. Smith (65 Minn. 304), 228.
Ames v. Witbeck (179 Ill. 458), 1718, 1727.
Ames Iron Works v. Rea (56 Ark. 450), 606.
Ames Iron Works v. Richardson (55 Ark. 642), 588, 590, 624.
Amis v. Kyle (2 Yerg. 31), 1052.
Amory v. Brodick (5 B. & Ald. 712), 1097.
Amson v. Dreher (35 Wis. 615), 362, 373.
Anderson v. Anderson (64 Ala. 403), 970.
Anderson v. Brenneman (44 Mich. 198), 964, 968.
Anderson v. Bruner (112 Mass. 14), 1291.
Anderson v. Crisp (5 Wash. 178), 702.
Anderson v. Frank (45 Mo. App. 482), 1638, 1639, 1643.
Anderson v. Gill (79 Md. 312), 1433.
Anderson v. Goff (72 Cal. 65), 1134.
Anderson v. Harold (10 Ohio, 399), 434, 449.
Anderson v. Jett (89 Ky. 375), 208.
Anderson v. May (50 Minn. 280), 1103.
Anderson v. Olsen (188 Ill. 502), 1718, 1729.
Anderson v. Read (106 N. Y. 333), 1504.
Anderson v. Roberts (18 Johns. 515), 150, 946, 977.
Anderson v. Smith (53 Md. 465), 132.
Anderson v. Soward (40 Ohio St. 325), 102.
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Andrew v. Dieterich (14 Wend. 31), 524, 535, 555.

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Andrews v. Durant (11 N. Y. 35), 755, 759.
Andrews v. German Nat. Bank (9 Heisk. 211), 1434.
Andrews v. Jenkins (39 Wis. 476), 148.
Andrews v. Hoover (8 Watts, 239), 1643, 1692.
Andrews v. Kneeland (6 Cow. 354), 1287, 1320.
Andrews v. Schreiber (93 Fed. R. 367), 1818, 1838.
Andrews v. Smith (34 Hun, 20), 711.
Angel v. McLellan (16 Mass. 28), 127, 128, 129.
Angier v. Taunton Paper Co. (1 Gray, 621), 630.
Anglo-American Prov. Co. v. Prentiss (157 Ill. 506), 227, 232, 1013, 1084, 1088, 1408.
Anglo-Egyptian Nav. Co. v. Rennie (L. R. 10 C. P. 271), 755, 762.
Angus v. Scully (176 Mass. 357), 1102.
Anheuser-Busch Brewing Ass'n v. Mason (44 Minn. 318), 1022.
Ansley v. Green (82 Ga. 181), 426.
Anthony v. Halstead (37 L. T. 433), 1276.
Anthony v. Haneys (8 Bing. 186), 626.
Anthony v. Unangst (174 Pa. St. 10), 1032.
Anvil Min. Co. v. Humble (153 U. S. 540), 1090, 1106.
Apperson v. Moore (30 Ark. 56), 202.
Appleby v. Johnson (L. R. 9 C. P. 158), 234.
Applegate v. Moffit (60 Ind. 104), 1281.
Appleman v. Michael (43 Md. 269), 740.
Appleton v. Bancroft (10 Metc. 236), 964, 1193.
Appleton v. Norwalk Library Ass'n (53 Conn. 4), 625.
Arbuckle v. Gates (95 Va. 802), 46, 49, 599, 603.
Arbuckle v. Reaume (96 Mich. 243), 1052, 1057, 1059.
Arbuckle Bros. v. Kirkpatrick (98 Tenn. 221), 49.
Archdale v. Moore (19 Ill. 565), 1350, 1352.
Archer v. Baynes (5 Ex. 625), 427.
Argus Co., Matter of (138 N. Y. 557), 1727.
Argus Co. v. City of Albany (55 N. Y. 495), 431.
Arkansas Cattle Co. v. Mann (130 U. S. 69), 495, 564, 577, 1786.
Arkansas Smelting Co. v. Belden Mining Co. (127 U. S. 379), 267.
Arkwright v. Newbold (17 Ch. D. 320), 856, 876.
Armfield v. Tate (7 Ired. 258), 1013.
Armington v. Houston (38 Vt. 448), 597.
Armitage v. Insole (14 Q. B. 728), 1106, 1127, 1130.
Armour v. Pecker (123 Mass. 143), 546, 549, 554, 564.
Arms v. Ashley (4 Pick. 71), 17.
Armstrong v. Bufford (61 Ala. 410), 1272, 1311.
Armstrong v. Freimuth (78 Minn. 94), 165.
Armstrong v. Johnson Tobacco Co. (41 Mo. App. 254), 1344.
Armstrong v. Lawson (73 Ind. 498), 336.
Armstrong v. Percy (5 Wend. 535), 1794, 1798, 1834.
Armstrong v. St. Paul Co. (48 Minn. 113), 49.
Armstrong v. Toler (24 U. S. 258), 1014.
Armstrong v. Turner (49 Md. 589), 1669.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Arnholt v. Hartwig (73 Mo. 485), 952.
Arnold v. Carpenter (16 R. I. 560), 1471, 1513, 1622, 1633, 1643.
Arnold v. Delano (4 Cush. 33), 725, 1117, 1474, 1479, 1485, 1486, 1492, 1510, 1515, 1519, 1523, 1604, 1612, 1670.
Arnold v. Engleman (103 Ind. 512), 138.
Arnold v. Richmond Iron Works (1 Gray, 434), 77, 83, 619.
Arnot v. Coal Co. (68 N. Y. 558), 208, 1019, 1040.
Arnstine v. Treat (71 Mich. 561), 879.
Arques v. Wasson (51 Cal. 620), 200, 202.
Artcher v. Zeh (5 Hill, 200), 416.
Arthus v. Moss (1 Oreg. 193), 1794.
Artman v. Ferguson (73 Mich. 146), 138.
Asbill v. Standley (— Cal. —), 964.
Ascher v. Grand Trunk Ry. Co. (36 Up. Can. Q. B. 609), 1586, 1611.
Ash v. Aldrich (60 N. H. 581), 328.
Ashby v. West (3 Ind. 170), 25.
Ashcroft v. Butterworth (136 Mass. 511), 210, 225, 138.
Ashcroft v. Morrin (4 M. & G. 450), 438.
Ashmead v. Hean (13 Pa. St. 584), 955.
Ashmead v. Reynolds (127 Ind. 441), 72.
Ashmore v. Cox (1 Q. B. 436), 1103.
Ashworth v. Wells (78 L. T. R. 136), 1819, 1827.
Askey v. Williams (74 Tex. 294), 122, 132.
Aspell v. Hosbein (98 Mich. 117). 1057.
Aspinwall Mfg. Co. v. Johnson (97 Mich. 531), 49.
Association v. Koch (14 La. Ann. 168), 208.
Atchinson v. Bruff (50 Barb. 381), 129.
Atkin v. Barwick (1 Str. 165), 1591, 1592.
Atkins v. Cobb (56 Ga. 86), 1334, 1392.
Atkins v. Colby (20 N. H. 155), 1579, 1606.
Atkins v. Insurance Co. (5 Metc. 439), 1136.
Atkinson v. Bell (8 B. & C. 277), 307, 759.
Atkinson v. Denby (7 Hurl. & Norm. 934), 1000.
Atkinson v. Horridge (Oliphant, 229), 1270.
Atkinson v. Morse (63 Mich. 276), 1709.
Atkinson v. Truesdell (127 N. Y. 230), 754.
Atherton v. Newhall (123 Mass. 141), 365, 403.
Atlantic Dock Co. v. New York (53 N. Y. 64), 1466.
Atlee v. Bartholomew (69 Wis. 43), 244.
Attwood v. Emery (1 Com. B. 110), 1129, 1134.
Atwater v. Clancy (107 Mass. 369), 1255, 1320, 1327.
Atwater v. Hough (29 Conn. 508), 293, 324.
Atwater v. Whiteman (41 Fed. R. 427). 1843.
Atwell v. Miller (6 Md. 10), 379, 964.
Atwood v. Cobb (16 Pick. 227), 1131.
Atwood v. Dearborn (1 Allen, 483), 923, 924.
Atwood v. Lucas (53 Me. 508), 1643, 1665, 1690.
Aubert v. Maze (2 Bos. & P. 371), 1012, 1015.
Auerbach v. Wunderlich (76 Minn. 42), 1380.
Augur v. Couture (68 Me. 427). 451.
Augusta Southern R. Co. v. Smith (106 Ga. 864), 473.
Ault v. Dustin (100 Tenn. 366), 1081, 1090, 1091.
Aultman & Co. v. Carr (16 Tex. Civ. App. 430), 895, 905.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Aultman v. Case (68 Wis. 612), 1817.
Aultman v. Clifford (55 Minn. 159), 1156.
Aultman v. Falkum (51 Minn. 562), 1257.
Aultman v. Gunderson (6 S. Dak. 226), 1806, 1812.
Aultman v. Hetherington (42 Wis. 622), 1817, 1818.
Aultman v. Kennedy (33 Minn. 339), 1255.
Aultman v. Lee (43 Iowa, 404), 1455.
Aultman v. Mallory (5 Neb. 178), 599.
Aultman v. McKenny (— Tex. Civ. App. —), 1384, 1396.
Aultman v. Olson (43 Minn. 409), 620, 837.
Aultman v. Shelton (90 Iowa, 288), 1240.
Aultman v. Silha (85 Wis. 359), 564, 578.
Aultman v. Theirer (34 Iowa, 272), 660, 1395, 1396.
Aultman v. Weber (28 Ill. App. 91), 1259.
Aultman v. Wykle (36 Ill. App. 293), 669.
Aultman Taylor Co. v. Ridenour (96 Iowa, 638), 1078, 1251, 1353, 1384.
Au Sable Boom Co. v. Sanborn (36 Mich. 358), 1423.
Austen v. Craven (4 Taunt. 644), 702, 711.
Austin v. Charlestown Seminary (8 Met. 196), 97.
Austin v. Davis (128 Ind. 472), 428.
Austin v. Dye (46 N. Y. 500), 599.
Austin v. Nickerson (21 Wis. 519), 1235.
Austrian v. Springer (94 Mich. 343), 1736, 1753.
Averill v. Hedge (12 Conn. 424), 245, 247, 251.
Avery v. Bowden (5 El. & Bl. 714), 1088, 1089, 1097.
Avery v. Chapman (62 Iowa, 144), 875.
Avery v. Ryan (74 Wis. 591), 1727.
Avery v. Willson (81 N. Y. 341), 242, 831, 1076, 1160, 1161, 1162, 1390, 1400, 1846.
Ayers v. Burns (87 Ind. 245), 123, 131.
Aymar v. Beers (7 Cow. 705), 1132.
Ayres v. French (41 Conn. 142), 901.
Ayres v. Parks (3 Hawks, 59), 1237.
Ayliff v. Archdale (Cro. Eliz. 920), 124.
Azemar v. Casella (L. R. 2 C. P. 431), 1333.
Baals v. Stewart (109 Ind. 371), 599.
Babb v. Clemson (10 S. & R. 419), 580, 960, 966.
Babcock v. Bonnell (80 N. Y. 244), 1523, 1612.
Babcock v. Case (61 Pa. St. 427), 914.
Babcock v. Deford (14 Kan. 408), 175.
Babcock v. Lawson (L. R. 4 Q. B. Div. 394), 924.
Bach v. Levy (101 N. Y. 511), 1212, 1818.
Babcock v. Trice (18 Ill. 420), 1340, 1393, 1395, 1844.
Bach v. Owen (5 T. R. 409), 404.
Bacharach v. Chester Frt. Line (133 Pa. St. 414), 1181.
Bachentoss v. Speicher (31 Pa. St. 324), 904.
Backman v. Mussey (31 Vt. 547), 1028.
Backman v. Wright (27 Vt. 187), 1028.
Bacon v. Brown (4 Bibb, 91), 910.
Bacon v. Cobb (45 Ill. 47), 1103, 1124, 1151.
Bacon v. Eccles (43 Wis. 227), 367, 463, 464.
Badger v. Phinney (15 Mass. 359), 109, 120.
Badlam v. Tucker (1 Pick. 389), 380, 1201.
Bagby v. State (82 Ga. 786), 1029.
Bagby v. Walker (78 Md. 239), 323.
Baglehole v. Walters (3 Camp. 151), 869, 933.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Bagley v. Findlay (82 Ill. 524), 1618, 1629, 1611, 1643, 1682.
Bagley v. Rolling Mills Co. (21 Fed. R. 159), 1156, 1237, 1240, 1335, 1393, 1844.
Bagueley v. Hawley (L. R. 2 C. P. 625), 1309.
Bahia & S. F. Ry. Co., In re (L. R. 3 Q. B. 584), 845.
Bailey v. Austrian (19 Minn. 545), 263.
Bailey v. Colby (34 N. H. 29), 588, 628.
Bailey v. Day (26 Me. 88), 1419.
Bailey v. De Crespigny (L. R. 4 Q. B. 180), 1099.
Bailey v. Forrest (2 C. & K. 131), 1270.
Bailey v. Foster (9 Pick. 139), 836.
Bailey v. Harris (8 Iowa, 331), 599.
Bailey v. Hervey (135 Mass. 172), 583, 619.
Bailey v. Kennedy (2 Del. Ch. 12), 955.
Bailey v. Long (24 Kan. 90), 711.
Bailey v. Merrell (3 Bulst. 94), 884.
Bailey v. Miltenberger (31 Pa. St. 41), 1267.
Bailey v. Mogg (4 Denio, 60), 1048.
Bailey v. Nickols (2 Root, 407), 1319.
Bailey v. Ogden (3 Johns. 399), 358, 434.
Bailey v. Railroad Co. (49 N. Y. 70), 736, 752.
Bailey v. Smith (43 N. H. 141), 493, 499, 714.
Bailey v. Sweeting (9 C. B., N. S., 843), 428.
Bainbridge v. Caldwell (4 Dana, 213), 542, 546, 554.
Bainbridge v. Pickering (2 W. Black. 1325), 127, 429.
Baines v. Jevons (7 C. & P. 288), 360.
Baird v. Hall (67 N. C. 230), 1455.
Baird v. Matthews (6 Dana, 129), 1242, 1268.
Baird v. Randall (58 Mich. 175), 1456.
Baker v. Arnot (67 N. Y. 448), 1303.
Baker v. Born (67 Ind. App. 422), 15.
Baker v. Carter (83 Me. 132), 183.
Baker v. Chicago, etc. R. Co. (98 Iowa, 438), 779.
Baker v. Crandall (78 Mo. 584), 878.
Baker v. Dening (8 A. & E. 94), 451.
Baker v. Drake (53 N. Y. 211), 1787.
Baker v. Drake (66 N. Y. 518), 1787.
Baker v. Gray (17 C. B. 462), 599.
Baker v. Hall (15 Iowa, 277), 202.
Baker v. Henderson (24 Wis. 509), 1242, 1389.
Baker v. Higgins (21 N. Y. 397), 513, 1162.
Baker v. Holt (56 Wis. 100), 227, 229.
Baker v. Johnson (37 Iowa, 186), 233.
Baker v. Kennett (54 Mo. 82), 105, 109, 121.
Baker v. Robbins (2 Denio, 136), 915.
Baker v. Taylor (54 Minn. 71), 156.
Baker v. Todd (6 Tex. 273), 1442.
Baker v. Woodruff (2 Barb. 523), 22.
Balderston v. Rubber Co. (18 R. I. 338), 47, 49.
Baldey v. Parker (2 B. & C. 37), 307, 349, 386.
Baldwin v. Crow (86 Ky. 679), 578.
Baldwin v. Doubleday (59 Vt. 7), 527, 529.
Baldwin v. Farnsworth (10 Me. 414), 1389.
Baldwin v. Hill (4 Kan. App. 168), 649.
Baldwin v. McKay (41 Miss. 358), 714.
Baldwin v. Van Deusen (37 N. Y. 487), 1259, 1260.
Baldwin v. Van Wagner (33 W. Va. 293, 603.
Baldwin v. Williams (3 Metc. 365), 331.
Baldwin v. Young (47 La. Ann. 1466), 647.
Ballantyne v. Appleton (82 Me. 570), 524, 534, 556.
Ballard v. Burgett (40 N. Y. 314), 599.
Ballard v. Winter (25 Vt. 581), 649.
Ballentine v. Robinson (46 Pa. St. 177), 754, 1696.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Ballou v. Billings (136 Mass. 307), 1087, 1089.
Balte v. Bedemiller (— Oreg. —), 1798.
Baltimore & Ohio R. Co. v. Brydon (65 Md. 198), 668, 672, 673.
Bamberger v. Schoolfield (160 U. S. 149), 955.
Banchor v. Mansel (47 Me. 58), 1013, 1019, 1027, 1048.
Bancroft v. Blizzard (13 Ohio, 30), 928.
Bancroft v. San Francisco Tool Co. (120 Cal. 228), 1349.
Bancroft v. Scribner (44 U. S. App. 480), 175.
Bangor Electric Co. v. Robinson (52 Fed. R. 520), 162.
Bangs v. Hornick (30 Fed. R. 97), 1031, 1032.
Banker v. Banker (63 N. Y. 409), 69.
Bank of Atchison v. Byers (139 Mo. 627), 875, 1840.
Bank of Beloit v. Beale (34 N. Y. 473), 908, 909.
Bank of Huntington v. Napier (41 W. Va. 481), 1198.
Bank of Little Rock v. Frank (63 Ark. 16), 909.
Bank of Montgomery v. Reese (2 Casey, 143), 1743.
Bank of Newport v. Hirsch (59 Ark. 225), 166.
Bank of Rochester v. Jones (4 N. Y. 497), 780, 788, 792, 1566.
Bank of St. Albans v. Farmers' Bank (10 Vt. 141), 1303.
Bank v. Cummings (89 Tenn. 609), 774.
Bank v. Curren (36 Iowa, 555), 1027.
Bank v. Danforth (14 Gray, 123), 649.
Bank v. Gifford (79 Iowa, 300), 1423.
Banks v. Everest (35 Kan. 687), 175.
Banner, Ex parte (2 Ch. Div. 278), 787.
Bannerman v. White (10 C. B., N. S., 844), 861, 863, 1225, 1333.
Bannon v. Aultman (80 Wis. 307), 1286, 1385.
Baptist Church v. Bigelow (16 Wend. 28), 426.
Barber v. Meyerstein (L. R. 4 H. L. 317), 166.
Barclay v. Smith (107 Ill. 349), 197.
Barclay v. Tracy (5 Watts & Serg. 45), 349.
Barden v. Montana Club (10 Mont. 330), ——.
Baring v. Corrie (2 B. & Ald. 137), 1451, 1452.
Barker v. Dinsmore (72 Pa. St. 427), 149. 269, 887.
Barker v. Freeland (91 Tenn. 112), 499.
Barker v. Hibbard (54 N. H. 539), 132.
Barker v. Keown (67 Ill. App. 433), 887.
Barker v. Mann (5 Bush, 672), 1742, 1755, 1762, 1763.
Barker v. Turnbull (51 Ill. App. 226), 1391.
Barker v. Walbridge (14 Minn. 469), 1437.
Barker v. Windle (6 E. & B. 675), 861.
Barksdale v. Brown (1 N. & McC. 517), 1264.
Barlow v. Lambert (28 Ala. 710), 1264.
Barnard v. Backhaus (52 Wis. 593), 1031, 1032, 1036.
Barnard v. Campbell (55 N. Y. 456), 154, 156, 158, 165, 908, 923, 924.
Barnard v. Crosby (6 Allen, 327), 1540.
Barnard v. Eaton (2 Cush. 295), 202.
Barnard v. Kellogg (10 Wall. 383), 832, 833, 1264, 1311, 1320, 1322, 1323, 1326, 1334, 1392.
Barndt v. Frederick (78 Wis. 1), 1841.
Barnes v. Barnes (6 Vt. 388), 336.
Barnes v. Brown (32 Mich. 146), 948.
Barnes v. Brown (130 N. Y. 372), 1744.
Barnes v. Burns (81 Wis. 232), 1235.
Barnes v. Hardman (15 Tex. 366), 150.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Barnes v. Morse (38 Ill. App. 274), 30.
Barnes v. McCrea (75 Iowa, 267), 29.
Barnes v. Smith (159 Mass. 344), 1031.
Barnes v. Toye (L. R. 13 Q. B. Div. 410), 127, 128, 132, 133.
Barnes Safe & Lock Co. v. Block Bros. Tobacco Co. (38 W. Va. 158), 49.
Barnet v. Smith (30 N. H. 256), 1433.
Barnett v. Speir (93 Ga. 762), 921.
Barney v. Brown (2 Vt. 374), 1193.
Barney v. Dewey (13 Johns. 224), 1798.
Barney & Smith Mfg. Co. v. Hart (8 Ky. Law R. 223), 578.
Barr v. Gibson (3 M. & W. 390), 1155, 1208.
Barr v. Logan (5 Harr. 52), 1682.
Barr v. Meyers (3 Watts & Serg. 295), 1125.
Barr v. Reitz (53 Pa. St. 256), 380, 960, 964, 988.
Barrett v. Goddard (3 Mason, 107), 964, 965, 1198.
Barrett v. Hall (1 Aik. 269), 1245.
Barrett v. Kelley (66 Vt. 515), 649.
Barrett v. Pritchard (2 Pick. 512), 554.
Barrett v. Strenton (2 Ala. 181), 818.
Barrett v. Veneer Works (110 Mich. 6), 1709.
Barrie v. Earle (143 Mass. 1), 1164.
Barrington v. Skinner (117 N. C. 47), 603.
Barron v. Alexander (27 Mo. 530), 869, 935.
Barrow, Ex parte (6 Ch. Div. 783), 1583.
Barrow v. Barrow (108 Ind. 345), 973.
Barrow v. Paxton (5 Johns. 258), 960.
Barrow v. Window (71 Ill. 214), 492, 493.
Barry v. Cavanaugh (127 Mass. 394), 1690.
Bartel v. Brown (104 Wis. 493), 1453.
Bartholomew v. Bentley (15 Ohio, 659), 878.
Bartholomew v. Bushnell (20 Conn. 271), 1810.
Bartholomew v. Finnemore (17 Barb. 428), 109.
Bartholomew v. Markwick (15 C. B. 710), 1097.
Bartlett v. Blake (37 Me. 124), 960.
Bartlett v. Board of Education (59 Ill. 364), 167.
Bartlett v. Drake (100 Mass. 174), 118.
Bartlett v. Hoppock (34 N. Y. 118), 1242, 1311, 1314, 1349.
Bartlett v. Jewett (98 Ind. 206), 749, 1183.
Bartlett v. Smith (4 McCrary, 388), 1031.
Bartlett v. Williams (1 Pick. 288), 963.
Barton v. Faherty (3 G. Greene, 327), 1302.
Barton v. Hunter (59 Mo. App. 610), 1433.
Barton v. Kane (17 Wis. 37), 746, 1158, 1392.
Barton v. McKelway (22 N. J. L. 165), 1128, 1139, 1188.
Bartram v. Farebrother (4 Bing. 579), 1577, 1591.
Barwick v. Buba (2 C. B. 563), 1089.
Bascom v. Danville Stove Co. (182 Pa. St. 427), 1402.
Bass v. Pease (79 Ill. App. 308), 964.
Bass v. Walsh (39 Mo. 192), 380, 527.
Bassett v. Brown (105 Mass. 551), 915, 916, 917.
Bassett v. Camp (54 Vt. 232), 1193.
Bassett v. Collis (2 Camp. 523), 1270.
Bassett v. Lockard (60 Ill. 164), 1307.
Bassett v. McKenna (52 Conn. 437), 973.
Bassinger v. Spangler (9 Colo. 175), 964.
Bastress v. Chickering (18 Ill. App. 198), 50.
Batchelder, In re (2 Low. 245), 1493, 1514.
Batchelder v. Carter (2 Vt. 168), 960.

References are to sections: Vol. I, §§ 1-797; Vol II, §§ 798-1850.

Batchelder v. Queen Ins. Co. (135 Mass. 449), 812.
Batchelder v. Sanborn (66 N. H. 192), 599, 603, 604.
Batchelder v. White (80 Va. 103), 953.
Batteman v. Robinson (12 Neb. 508), 999.
Bates v. Ball (72 Ill. 108), 86.
Bates v. Chesebro (32 Wis. 594, 36 Wis. 636), 419.
Bates v. Conkling (10 Wend. 389), 502.
Bates v. Coster (1 Hun, 400), 305.
Bates v. Elmer Glass Mfg. Co. (— N. J. Eq. —), 492.
Bates v. Smith (83 Mich. 347), 199, 200.
Bates v. Stansell (19 Mich. 91), 1787.
Bauendahl v. Horr (7 Blatchf. 548), 554, 633.
Baughman v. Gould (45 Mich. 481), 863, 875.
Baum v. Stevens (2 Ired. 411), 862, 1229, 1240.
Bauman v. James (3 Ch. 508), 426.
Baumbach Co. v. Gessler (79 Wis. 567), 1344.
Baxendale v. London, etc. Ry. Co. (L. R. 10 Ex. 35), 1769.
Baxter v. Earl of Portsmouth (2 C. & P. 178), 84.
Baxter v. Sherman (73 Minn. 434), 268.
Bayley v. Taber (5 Mass. 286), 1057.
Baylis v. Davis (47 Iowa, 340), 49.
Baylis v. Dinely (3 M. & Sel. 447), 124.
Bayliss v. Hennessey (54 Iowa, 11), 1384.
Bayly v. Schofield (1 M. & Sel. 338), 1540.
Bayonne Knife Co. v. Umbenhauer (107 Ala. 496), 1539, 1571.
Bazeley v. Forder (L. R. 3 Q. B. 559), 186.
Beach's Appeal (58 Conn. 464), 588, 590, 614, 619, 620, 625.
Beach v. Boynton (26 Vt. 725), 970.
Beadles v. McElrath (85 Ky. 231), 1031.
Beadles v. Ownby (16 Lea. 424), 1031.
Beall v. McGehee (57 Ala. 438), 872.
Beals v. Guernsey (8 Johns. 446), 960.
Beals v. Olmstead (24 Vt. 114), 1237, 1344.
Beals v. See (10 Pa. St. 56), 74.
Beam v. Blanton (3 Ired. Eq. 59), 1482.
Bean v. Burbank (16 Me. 458), 263.
Bean v. Smith (2 Mass. 252), 978.
Beardsley v. Beardsley (138 U. S. 262), 564, 577.
Beardsley v. Hotchkiss (26 N. Y. 207), 107.
Beardsley v. Smith (61 Ill. App. 340), 210, 1702.
Bearns, In re (2 Fed. Cas. 1190), 1586.
Beasley v. Beasley (180 Ill. 163), 83.
Beasley v. Bray (98 N. C. 266), 952.
Beasley v. Huyett & Smith Mfg. Co. (92 Ga. 273), 935, 1396.
Beauchamp v. Archer (58 Cal. 431), 1084.
Beaumont v. Brengeri (5 Com. B. 301), 361, 385.
Beaumont v. Crane (14 Mass. 400), 988.
Beaupré v. Telegraph Co. (21 Minn. 155), 224.
Beaver v. Beaver (117 N. Y. 421), 12.
Beavers v. Lane (6 Duer, 238), 891.
Becherer v. Asher (23 Ont. App. 202), 188.
Beck v. Blue (42 Ala. 32), 689, 690.
Beck v. Sheldon (48 N. Y. 365), 1395.
Becker v. Hallgarten (86 N. Y. 167), 1559, 1563.
Becker v. Holm (89 Wis. 86), 373.
Becker v. Smith (59 Pa. St. 469), 32, 580.
Beckwith v. Burrough (14 R. I. 366), 945.
Beckwith v. Cheever (21 N. H. 41), 229, 244.
Beckwith v. Farnum (5 R. I. 230), 1430.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Beckwith v. Talbot (2 Colo. 639), 428.
Bedell v. Kowalsky (99 Cal. 236), 1158, 1374.
Bedell v. Wilder (65 Vt. 406), 277.
Bedford v. Hunt (1 Mason, 303), 834.
Bedford v. Penny (58 Mich. 424), 953.
Bedinger v. Wharton (27 Gratt. 827), 109.
Bedsworth v. Bowman (104 Mo. 44), 139.
Beebe v. Hatfield (67 Mo. App. 609), 902.
Beebe v. Knapp (28 Mich. 53), 863, 875.
Beebe v. Robert (12 Wend. 413), 1320.
Beecher v. Mayall (16 Gray, 376), 964.
Beeckman v. Montgomery (14 N. J. Eq. 106), 973.
Beede v. Lamprey (64 N. H. 510), 1786.
Beeler v. Young (1 Bibb, 519), 123, 124, 131, 132.
Beeman v. Banta (118 N. Y. 538), 1822.
Beeman v. Buck (3 Vt. 53), 1237, 1810.
Beeman v. Lawton (37 Me. 543), 39.
Beer v. Walker (46 L. J. C. P. 677), 1265, 1298, 1358.
Beers v. Crowell (Dud. 28), 331.
Beers v. Williams (16 Ill. 69), 1344.
Beesley v. Hamilton (50 Ill. 88), 878.
Beetle v. Anderson (98 Wis. 5), 875, 878, 892, 932.
Beggs v. Bartels (— Conn. —), 650.
Begley v. Morgan (15 La. 162), 380.
Behn v. Burness (1 B. & S. 877), 861.
Behn v. Burness (3 B. & S. 751), 1075, 1145.
Behrends v. Beyschlag (50 Neb. 304), 1408.
Behrens v. McKenzie (23 Iowa, 333), 73, 74.
Beidler v. Crane (135 Ill. 92), 952, 978.
Beirne v. Dord (5 N. Y. 95), 1212, 1320, 1322, 1325, 1326.
Beirne v. Dunlap (8 Leigh, 514), 16.
Belcher v. Costello (122 Mass. 189), 937.
Belcher v. Sellards (19 Ky. L. 157), 1374, 1389.
Belding v. Frankland (8 Lea, 67), 901, 903, 924.
Belfast, etc. Ry. Co. v. Unity (62 Me. 148), 233.
Belfield v. National Supply Co. (189 Pa. St. 189), 268.
Belknap v. Bender (75 N. Y. 446), 1070.
Bell v. Campbell (123 Mo. 1) 1000.
Bell v. Ellis (33 Cal. 620), 906.
Bell v. Hoffman (92 N. C. 273), 1083.
Bell v. Moss (5 Whart. 189), 1537.
Bell v. McCloskey (155 Pa. St. 319), 964.
Bell v. Offut (10 Bush. 632), 1643.
Bell v. Reynolds (78 Ala. 511), 1763, 1774, 1824.
Bellas v. Hays (5 S. & R. 427), 834.
Bellefontaine v. Vassaux (55 Ohio St. 323), 774, 777, 779.
Belleville Pump Works v. Samuelson (16 Utah, 234), 895, 897, 924.
Bellows v. Wells (36 Vt. 599), 964.
Belote v. Morrison (8 Minn. 62), 40.
Belser v. Tuscumbia Banking Co. (105 Ala. 514), 138.
Belshaw v. Bush (11 C. B. 191), 1466.
Bement v. Smith (15 Wend. 493), 754, 1187.
Bemis v. Leonard (118 Mass. 502), 1136.
Benedict v. Bachelder (24 Mich. 425), 1057.
Benedict v. Field (4 Duer, 154), 652.
Benedict v. Field (16 N. Y. 595), 1430.
Benedict, etc. Mfg. Co. v. Jones (64 Mo. App. 218), 485, 492.
Benedict v. Schaettle (12 Ohio St. 515), 1540, 1542, 1543.
Benford v. Schell (55 Pa. St. 393), 380, 964.
Benham v. Bishop (19 Conn. 330), 121.
Beninger v. Corwin (24 N. J. L. 257), 869.
Benjamin v. Benjamin (15 Conn. 347), 178.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Benjamin v. Madden (94 Va. 66), 965.
Benner v. Puffer (114 Mass. 376), 564, 583, 599.
Bennett v. Brumfitt (L. R. 3 C. P. 28), 451.
Bennett v. Buchan (76 N. Y. 386), 1272.
Bennett v. Collins (52 Conn. 1), 121.
Bennett v. Gibbons (55 Conn. 450), 879.
Bennett v. Gillette (3 Minn. 423), 189.
Bennett v. Hull (10 Johns. 364), 328.
Bennett v. McLaughlin (13 Ill. App. 349), 120.
Bennett v. O'Fallon (2 Mo. 69), 184.
Bennett v. Scutt (18 Barb. 347), 336.
Bensley v. Bignold (5 B. & Ald. 335), 1045.
Bent v. Cobb (9 Gray, 397), 461, 462.
Bent v. Hoxie (90 Wis. 625), 603.
Bent v. Manning (10 Vt. 225), 131.
Bentall v. Burn (3 B. & C. 423), 387, 524, 964, 1133, 1493.
Benton v. Fay (64 Ill. 417), 1790, 1792.
Benton v. Snyder (22 Minn. 247), 960.
Bergan v. Magnus (98 Ga. 514), 543.
Bergeman v. Railroad Co. (104 Mo. 77), 774, 779.
Berger v. State (50 Ark. 20), 741, 774, 777.
Bergh v. Warner (47 Minn. 250), 183.
Berkey & Gay Furn. Co. v. Hascall (123 Ind. 502), 1774, 1792.
Berkshire Glass Co. v. Walcott (2 Allen, 227), 1411.
Berkson v. Heldman (58 Neb. 595), 898.
Bernard v. Taylor (23 Oreg. 416), 999, 1030.
Berndtson v. Strang (L. R. 4 Eq. 481), 1547, 1548, 1561.
Bernhardt v. Walls (29 Mo. App. 206), 331.
Bernshouse v. Abbott (16 Vroom, 531), 1447, 1451.
Berolles v. Ramsay (Holt, N. P. 77), 132.
Berry v. Ensell (2 Gratt. 333), 963.
Berry v. Griffin (10 Md. 27), 1423, 1425.
Berry v. Insurance Co. (132 N. Y. 49), 914.
Berry v. Monroe (57 Mich. 187), 39.
Berry v. Nall (54 Ala. 446), 1137.
Berry v. Shannon (98 Ga. 459), 1817, 1821.
Bertelson v. Bower (81 Ind. 512), 492, 714.
Berthold v. Seevers Mfg. Co. (89 Iowa, 506), 1350, 1380.
Bertoli v. Smith (69 Vt. 425), 1451, 1452.
Best v. Bander (29 How. Pr. 489), 1051.
Best v. Flint (58 Vt. 543), 1214, 1335, 1340, 1344, 1393, 1395, 1811.
Best v. Osborne (Ryan & Moo. 290), 1270.
Bestor v. Hickey (71 Conn. 181), 1032.
Bethell v. Clark (20 Q. B. Div. 615), 1576.
Bethel Steam Mill Co. v. Brown (57 Me. 9), 488, 528, 964, 1197.
Bettini v. Gye (1 Q. B. Div. 183), 1065.
Betts v. Lee (5 Johns. 348), 639.
Beurmann v. Van Buren (44 Mich. 496), 909, 952.
Beverly v. Lincoln Gas Co. (6 A. & E. 829), 682, 1370.
Bianchi v. Nash (1 M. & W. 545), 682, 1370.
Bibb v. Allen (149 U. S. 481), 434, 1031, 1039.
Bibb v. Freeman (59 Ala. 612), 970, 971.
Bibb v. Snodgrass (97 Ala. 459), 1433.
Bickel v. Sheets (24 Ind. 1), 1013, 1023.
Bickford v. First Nat. Bank (42 Ill. 238), 1434.
Bickley v. Keenan (60 Ala. 293), 451.
Bicknall v. Waterman (5 R. I. 43), 1430.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Bidault v. Wales (20 Mo. 546), 902, 924.
Biddinger v. Wiland (67 Md. 359), 953.
Biederman v. O'Connor (117 Ill. 493), 100.
Bierce v. Stocking (11 Gray, 174), 834.
Bierman v. City Mill Co. (151 N. Y. 482), 1281, 1346.
Bigelow v. Benedict (70 N. Y. 202), 203, 1031, 1032.
Bigelow v. Kinney (3 Vt. 353), 95, 100.
Bigelow v. Legg (102 N. Y. 652), 1690.
Bigelow v. Walker (24 Vt. 149), 175.
Bigg v. Whisking (14 C. B. 195), 349.
Bigge v. Parkinson (7 H. & N. 955), 1261, 1340, 1342.
Bigley v. Risher (63 Pa. St. 152), 205.
Biggs v. Barry (2 Curtis, 259), 902, 906, 1559.
Biggs v. Perkins (75 N. C. 397), 1272.
Bill v. Bament (9 M. & W. 36), 424, 1493.
Billin v. Henkel (9 Colo. 394), 365.
Billing v. Pilcher (7 B. Mon. 458), 184.
Billings v. Mason (80 Me. 496), 1449.
Billingslea v. Smith (77 Md. 504), 1031.
Billingsley v. White (59 Pa. St. 464), 964, 966.
Bindley v. Martin (28 W. Va. 773), 960.
Bingham v. Vandergrift (93 Ala. 283), 583.
Binkley v. Forkner (117 Ind. 176), 647.
Binney v. Annan (107 Mass. 94), 1729.
Birch v. Linton (78 Va. 584), 95.
Birchinell v. Hirsch (5 Colo. App. 500), 906.
Bird v. Boulter (4 B. & Ad. 443), 462.
Bird v. Brown (4 Exch. 786), 1537,
Bird v. Decker (64 Mo. 550), 451.
Bird v. Muhlinbrink (1 Rich. 199), 322, 324.
Bird v. Munroe (66 Me. 337), 424.
Bird Co. v. Hurley (87 Me. 579), 138.
Birge v. Edgerton (28 Vt. 291), 964.
Birks v. French (21 Kan. 238), 1052.
Bisbee v. McAllen (39 Minn. 143), 1045, 1046, 1050.
Bish v. Beatty (111 Ind. 403), 937.
Bishop v. Honey (34 Tex. 245), 1013, 1022.
Bishop v. Minderhout (— Ala. —), 634.
Bishop v. Rutledge (7 J. J. Marsh. 217), 692.
Bishop v. Small (63 Me. 12), 937.
Bishop v. Stewart (13 Nev. 25), 914.
Bishop v. Weber (139 Mass. 411), 878.
Bissell v. Balcom (39 N. Y. 275), 420.
Bissell v. Hopkins (3 Cow. 166), 960.
Bissell v. Terry (69 Ill. 184), 257.
Black v. Delbridge, etc. Co. (90 Mich. 56), 1377.
Black v. Nease (37 Pa. St. 433), 973.
Black v. Wabash Ry. Co. (111 Ill. 351), 266.
Black v. Webb (20 Ohio, 304), 41, 634.
Black River Lumber Co. v. Warner (93 Mo. 374), 1676, 1694, 1696, 1702.
Blackburn v. Reilly (47 N. J. L. 290), 1148.
Blackett v. Royal Exch. Assur. Co. (2 Cr. & J. 249), 1264.
Blackford v. Christian (1 Knapp, 77), 65.
Blackman v. Pierce (23 Cal. 508), 1579.
Blackmer v. Stone (51 Ark. 489), 1729.
Blackmore v. Fairbank (79 Iowa, 288), 1242, 1258, 1260, 1344.
Blacknall v. Rowland (118 N. C. 418), 1801.
Blackshear v. Burke (74 Ala. 239), 1482.
Blackwood v. Packing Co. (76 Cal. 212), 6, 519, 520, 1340.
Blair v. Smith (114 Ind. 114), 950.
Blair v. Wilson (28 Gratt. 165 , 1435.
Blake v. Blackley (109 N. C. 257), 901.
Blake v. Graves (18 Iowa, 312), 963.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Blakely v. Blakely (33 N. J. Eq. 502), 83.
Blakely v. Patrick (67 N. C. 40), 714.
Blakeny v. Goode (30 Ohio St. 350), 1729.
Blakeslee v. Rossman (43 Wis. 116), 960.
Blanchard v. Child (7 Gray, 155), 599.
Blanchard v. Cooke (144 Mass. 207), 583, 757.
Blasdale v. Babcock (1 Johns. 517), 1798, 1834.
Blass v. Anderson (57 Ark. 483), 1053.
Bleakley v. White (4 Paige, 654), 1466.
Bleecker v. Smith (13 Wend. 530), 1073.
Blenkinsop v. Clayton (7 Taunt. 597), 405.
Bligh v. James (6 Allen, 570), 1004.
Blinn v. Chester (5 Day, 359), 1420.
Bliss v. Bliss (7 Bosw. 339), 1452.
Bliss v. Clark (16 Gray, 60), 175, 941.
Bliss v. Cutler (19 Barb. 9), 1459.
Bliss v. Lawrence (58 N. Y. 442), 200.
Bliss v. Negus (8 Mass. 46), 834.
Bliss Co. v. U. S. Incan. Gas L. Co. (149 N. Y. 300), 1123, 1124, 1130.
Block v. McMurray (56 Miss. 217), 998, 1000, 1054.
Block Bros. v. Maas (65 Ala. 211), 702.
Blodget v. Safe Co. (76 Mich. 538), 1265.
Blood v. Enos (12 Vt. 625), 804.
Blood v. Wilkins (43 Iowa, 568), 1755.
Bloom v. Moy (43 Minn. 397), 974.
Bloom v. Richards (2 Ohio St. 387), 1052.
Bloomer v. Dau 122 Mich, 522), 1453.
Bloomingdale v. Memphis, etc. R. Co. (6 Lea, 616), 1540, 1606.
Blowers v. Sturtevant (4 Denio, 46), 184.
Bloxam v. Morley (4 B. & Cr. 951), 1513.
Bloxam v. Sanders (4 Barn. & C. 941), 1119, 1129, 1513, 1515.
Bloxsome v. Williams (3 B. & C. 232), 1052.
Bloyd v. Pollock (27 W. Va. 75), 733, 1189.
Bluegrass Cordage Co. v. Luthy (98 Ky. 583), 1765, 1776.
Blum v. Marks (21 La. Ann. 268), 1542.
Blumenthal v. Stahle (98 Iowa. 722), 1774.
Blumer v. Pollak (18 Fla. 707), 138.
Blunt v. Walker (11 Wis. 334), 1428.
Blydenburgh v. Welsh (Bald. 331), 208, 1129.
Board of Trustees v. Anderson (63 Ind. 367), 97.
Boardman v. Cutter (128 Mass. 388), 331.
Boardman v. Keeler (1 Aik. 158), 960.
Boardman v. Sill (1 Camp. 410), 1502.
Boardman v. Spooner (13 Allen, 353), 365, 387, 441, 451, 964, 1254.
Boaz v. Schneider (69 Tex. 128), 519.
Bock v. Healey (8 Daly, 156), 1389.
Bog Lead Co. v. Montague (10 C. B. 481), 371, 730.
Bogert v. Chrystie (24 N. J. L. 57), 1309.
Bogy v. Rhodes (4 Greene, 133), 502.
Bohtlingk v. Inglis (3 East, 381), 1526, 1548, 1549, 1577.
Boles v. Merrill (173 Mass. 491), 937, 942.
Bolin v. Huffnagle (1 Rawle, 1), 1548.
Bollinger v. Wilson (76 Minn. 262), 1028.
Bollman v. Burt (61 Md. 415), 1148.
Bollman v. Lucas (22 Neb. 796), 953.
Bolton v. Railway Co. (L. R. 1 Com. Pl. 439), 1527, 1559, 1591.
Bolton v. Riddle (35 Mich. 13), 1129, 1189.
Bolton Partners v. Lambert (41 Ch. Div. 295), 1537.
Bomberger v. Griener (18 Iowa, 477), 1396.

References are to sections: Vol. I, §§ 1-797; Vol II, §§ 798-1850.

Bond v. Bond (7 Allen, 1), 83.
Bond v. Bunting (78 Pa. St. 210), 960. 988.
Bond v. Clark (35 Vt. 577), 1237.
Bond v. Gibson (1 Camp. 185), 145.
Bond v. Greenwald (4 Heisk. 453), 512.
Bond v. McMahon (94 Mich. 557), 1426.
Bonesteel v. Flack (41 Barb. 435), 597.
Bongard v. Block (81 Ill. 186), 970.
Bonham Cotton Comp. Co. v. McKellar (86 Tex. 694), 1384.
Bonner v. Marsh (10 Sm. & M. 376), 736, 752, 1173.
Bonewell v. Jenkins (8 Ch. D. 70), 235.
Boody v. McKenney (23 Me. 525), 107, 109, 118, 121.
Booker v. Jones (55 Ala. 266), 202.
Bool v. Mix (17 Wend. 119), 95, 106, 107.
Boone v. Eyre (1 H. Bl. 273), 861.
Boorman v. Jenkins (12 Wend. 566), 1320, 1322, 1325, 1326, 1836.
Booth v. Hodgson (6 T. R. 405), 1012, 1015.
Booth v. Rolling Mill Co. (60 N. Y. 487), 1103, 1138, 1766, 1770, 1791, 1831, 1833.
Booth v. Smith (3 Wend. 66), 1420.
Boothby v. Plaisted (51 N. H. 436), 671, 730, 731, 739, 1028, 1320.
Boothby v. Scales (27 Wis. 626), 816, 818, 1155, 1208, 1240, 1260, 1281, 1285, 1805.
Borden v. Croak (131 Ill. 68), 202.
Bordwell v. Collie (45 N. Y. 494), 1796.
Borland v. Guffy (1 Grant's Cas. 394), 232.
Borland v. Nevada Bank (99 Cal. 89), 204.
Born v. First Nat. Bank (123 Ind. 178), 1434.
Born v. Shaw (29 Pa. St. 288), 649, 960, 964.
Borrekins v. Bevan (3 Rawle, 23), 1334, 1393.
Borries v. Imperial Bank (L. R. 9 Com. P. 38), 1451.
Borries v. Hutchinson (18 C. B., N. S., 445), 1770.
Borrowscale v. Bosworth (99 Mass. 378), 373.
Borthwick v. Young (12 Ont. App. 671), 1322.
Bosshardt & Wilson Co. v. Crescent Oil Co. (171 Pa. St. 109), 142, 239, 252, 253.
Bostock v. Jardine (3 Hurl. & Colt, 700), 1158.
Boston Ice Co. v. Potter (123 Mass. 28), 267, 268.
Boston, etc. R. R. Co. v. Bartlett (3 Cush. 224), 244.
Boston & Albany R. R. Co. v. Richardson (135 Mass. 473), 1302.
Bostwick v. Leach (3 Day, 476), 334, 337.
Boswell v. Green (1 Dutch. 390), 206, 499, 527.
Bothwell v. Farwell (74 Iowa, 324), 1265.
Bottenberg v. Nixon (97 Ind. 106), 25.
Bouchell v. Clary (3 Brev. 194), 122, 124.
Boulter v. Arnott (1 C. & M. 333), 1485.
Boulton v. Jones (2 Hurl. & Nor. 564), 267.
Bourn v. Davis (76 Me. 223), 937.
Bourne v. Seymour (16 Com. B. 337), 1169.
Boutelle v. Melendy (19 N. H. 196), 1057.
Bowdell v. Parsons (10 East, 359), 1097.
Bowditch v. New England Life Ins. Co. (141 Mass. 292), 1045, 1046.
Bowen v. Burk (13 Pa. St. 146), 549.
Bowen v. Frick (75 Ga. 786), 619.
Bowen v. Hoskins (45 Miss. 183), 971.

References are to sections: Vol. I, §§ 1-797; Vol II, §§ 798-1850.

Bowen v. Lansing Wagon Works (91 Tex. 385), 603.
Bowen v. McCarthy (85 Mich. 26), 228, 234.
Bowen v. Sullivan (62 Ind. 287), 273, 274.
Bowers v. Bowers (95 Pa. St. 477), 336.
Bowersox's Appeal (100 Pa. St. 434), 1540.
Bowery Nat. Bank v. Wilson (122 N. Y. 478), 200.
Bowes v. Shand (2 App. Cas. 455), 653, 1138, 1139, 1145, 1155.
Bowker v. Bradford (140 Mass. 521), 138.
Bowker v. Hoyt (18 Pick. 555), 1161, 1162.
Bowlby v. Bell (3 C. B. 284), 329.
Bowman v. Carithers (40 Ind. 90), 879.
Bowman v. Clemmer (50 Ind. 10), 1265, 1271.
Bowman v. Conn (8 Ind. 58), 345, 352.
Bowman v. Taylor (2 Ad. & El. 278), 834.
Bowman Distilling Co. v. Nutt (34 Kan. 724), 1027.
Bowry v. Bennet (1 Camp. 348), 1012, 1020.
Bowser v. Birdsell (49 Mich. 5), 1673.
Box v. Insurance Co. (15 Grant's Ch. 337), 714.
Boyce v. Smith (9 Gratt. 704), 61.
Boyd v. Anderson (1 Overt. 438), 1303.
Boyd v. De la Montagnie (73 N. Y. 498), 948.
Boyd v. Dunlap (1 Johns. Ch. 478), 957.
Boyd v. Eaton (44 Me. 51), 1004.
Boyd v. Gunnison (14 W. Va. 1), 1127, 1129.
Boyd v. Hanson (41 Fed. R. 174), 1031.
Boyd v. Lofton (34 Ga. 494), 627.
Boyd v. Shiffer (156 Pa. St. 100), 892, 905, 909.
Boyd v. Wilson (83 Pa. St. 319), 1320.
Boydell v. Drummond (11 East, 142), 426.
Boyden v. Boyden (9 Met. 519), 121.
Boyer v. Berryman (123 Ind. 451), 72, 77.
Boyington v. Sweeney (77 Wis. 55), 1380.
Boyle v. Maroney (73 Iowa, 70), 953.
Boyles v. Overby (11 Gratt. 202), 1817.
Boynton v. Page (13 Wend. 425), 1052.
Boynton v. Veazie (24 Me. 286, 380, 528, 964.
Brabin v. Hyde (32 N. Y. 519), 416.
Brackett v. Edgerton (14 Minn. 174), 1736.
Brackett v. Hoyt (29 N. H. 264), 1047.
Braddock Glass Co. v. Irwin (153 Pa. St. 440), 733, 1184.
Bradeen v. Brooks (22 Me. 463), 483.
Bradford v. Beyer (17 Ohio St. 388), 947.
Bradford v. Bush (10 Ala. 386), 862, 1229, 1281, 1294.
Bradford v. Manley (13 Mass. 139), 1320, 1327, 1329.
Bradford v. Marbury (12 Ala. 520), 740.
Bradley v. Harwi (43 Kan. 314), 1423.
Bradley v. Holdsworth (3 M. & W. 422), 329.
Bradley v. King (44 Ill. 339), 1148.
Bradley v. Obear (10 N. H. 477), 148.
Bradley v. Poole (98 Mass. 169), 936.
Bradley v. Pratt (23 Vt. 378), 122, 123, 125.
Bradley v. Rea (14 Allen, 20), 207, 1055.
Bradley v. Rea (103 Mass. 188), 207.
Bradley v. Wheeler (44 N. Y. 495), 519.
Bradley Mfg. Co. v. Raynor (70 Ill. App. 639), 49.
Bradshaw v. Thomas (7 Yerg. 497), 564.
Bradway v. Groenedyke (153 Ind. 508), 1424.
Brady v. Cassidy (145 N. Y. 171), 1078, 1161.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Brady v. Cole (164 Ill. 116), 936.
Brady v. Harraby (21 Up. Can. Q. B. 340), 417.
Brady v. Todd (9 C. B. 592), 1294.
Brady v. Yost (— Idaho, —), 1724, 1727, 1728.
Bragg v. Cole (6 J. B. Moore, 114), 1162.
Bragg v. Morrill (49 Vt. 45), 1314, 1346.
Brainerd v. Heydrick (32 How. Pr. 97), 451, 1003, 1004.
Braley v. Powers (92 Me. 203), 875, 936.
Branan v. Atlanta R. Co. (108 Ga. 70), 1563.
Branch v. Palmer (65 Ga. 210), 1148.
Brand v. Focht (1 Abb. App. Dec. 185), 355.
Brand v. Lock (48 Ill. App. 390), 1032.
Brandas v. Barnett (3 C. B. 519), 468.
Brandas v. Barnett (12 Cl. & Fin. 787), 468.
Brandon v. Brown (106 Ill. 519), 109, 1307.
Brandt v. Bowlby (2 B. & Ad. 932), 735, 779, 782, 787.
Brandt v. Lawrence (1 Q. B. D. 344), 1141, 1145.
Branson v. Turner (77 Mo. 489), 816, 1272, 1273, 1805.
Brantley v. Thomas (22 Tex. 270), 1320, 1340.
Brantley v. Wolf (60 Miss. 420), 110.
Branton v. Griffits (L. R. 2 C. P. Div. 212), 1199.
Brauer v. Shaw (168 Mass. 198), 247.
Braun v. Keally (146 Pa. St. 519), 46, 49, 1027.
Brawley v. United States (96 U. S. 168), 1145, 1166, 1167, 1169.
Brawn v. Keller (43 Pa. St. 104), 960, 964, 966.
Brayshaw v. Eaton (5 Bing. N. C. 231), 127, 128.
Brayton v. Harding (56 Ill. App. 362), 624.
Brechwald v. People (21 Ill. App. 213), 740.
Breckenridge v. Ormby (1 J. J. Marsh. 239), 72, 93.
Breckinridge v. Crocker (78 Cal. 529), 443.
Breen v. Moran (51 Minn. 525), 1214, 1344.
Breinig v. Meitzler (23 Pa. St. 156), 184.
Breitung v. Lindauer (37 Mich. 217), 1423.
Brent v. Green (6 Leigh, 16), 461.
Brenton v. Davis (8 Blackf. 317), 1317, 1344.
Brett v. Carter (2 Low. 458), 202.
Bretz v. Diehl (117 Pa. St. 589), 26, 1158.
Brewer v. Broadwood (22 Ch. Div. 105), 1096.
Brewer v. Ford (54 Hun, 116), 633.
Brewer v. Horst-Lachmund Co. (— Cal. —), 437.
Brewer v. Housatonic R. Co. (104 Mass. 593), 757, 1155.
Brewer v. Salisbury (9 Barb. 511), 1190.
Brewer v. Salt Ass'n (47 Mich. 526), 499, 516, 760.
Brewing Ass'n v. Manufacturing Co. (81 Tex. 99), 604, 645.
Brewster v. Bours (8 Cal. 502), 1428.
Brewster v. Burnett (125 Mass. 68), 916.
Brewster v. Carnes (103 N. Y. 556), 1453.
Brewster v. Kitchel (1 Salk. 198), 1099.
Brewster v. Van Lien (119 Ill. 554), 1786, 1787.
Brewster v. Wooster (131 N. Y. 473), 629.
Brick Pres. Church v. Mayor (5 Cowan, 538), 1099.
Bricker v. Hughes (4 Ind. 146), 342, 714.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Brickley v. Walker (68 Wis. 563), 138.
Bridges v. Garrett (L. R. 5 C. P. 451), 1455, 1460.
Bridgewater Iron Co. v. Enterprise Ins. Co. (134 Mass. 433), 275.
Brigg v. Hilton (99 N. Y. 517), 1222, 1392, 1395, 1808.
Briggs v. A Light Boat (7 Allen, 287), 759.
Briggs v. Hunton (87 Me. 145), 1047, 1346.
Briggs v. Lucas (86 Iowa, 202), 1826.
Briggs v. Merrill (58 Barb. 389), 947.
Briggs v. McCabe (27 Ind. 327), 107, 109.
Briggs v. McEwen (77 Iowa, 303), 585.
Briggs v. Parkman (2 Metc. 258), 960.
Briggs v. Rumely Co. (96 Iowa, 202), 1251, 1385.
Briggs v. Sizer (30 N. Y. 647), 1505.
Briggs v. United States (143 U. S. 346), 485.
Briggs v. Weston (36 Fla. 629), 960.
Brigham v. Carlisle (78 Ala. 243), 1777.
Brigham v. Hibbard (28 Oreg. 387), 731, 1293.
Brigham v. Retelsdorf (73 Iowa, 712), 1320.
Brighty v. Norton (3 B. & S. 305), 1416.
Bristol Bread Co. v. Maggs (44 Ch. Div. 616), 252.
Bristol Savings Bank v. Keavy (128 Mass. 298), 953.
British Columbia Sawmill Co. v. Nettleship (L. R. 3 C. P. 499), 750, 1770.
British & Ames Mtg. Co. v. Tibballs (63 Iowa, 468), 1455.
Britt v. Aylett (11 Ark. 475), 947.
Brittain v. Crowthers (4 C. C. A. 341), 953.
Britton v. Turner (6 N. H. 481), 1162.
Broadwater v. Quarne (10 Mo. 277), 87.
Broadwell v. Howard (77 Ill. 305), 166, 709, 964.
Brock v. Rich (76 Mich. 644), 950.
Brockhaus v. Schilling (52 Mo. App. 73), 939.
Brockway v. Maloney (102 Mass. 308), 739.
Broennenburgh v. Haycock (Holt, N. P. 630), 1270.
Brogden v. Marriott (2 Bing. N. C. 473), 211.
Brogden v. Metropolitan Ry. Co. (2 App. Cas. 666), 218, 235, 238.
Bromberger v. Griener (18 Iowa, 477), 1232.
Bronson v. Chapman (63 N. Y. 625), 331.
Bronson v. Gleason (7 Barb. 472), 1124.
Bronson v. Leach (74 Mich. 713), 1248.
Brooker v. Scott (11 M. & W. 67), 132.
Brooklyn Oil Refinery v. Brown (38 How. Pr. 444), 1127.
Brookover v. Hurst (1 Met. 665), 947.
Brooks v. Byam (2 Story, 525), 197.
Brooks v. Hamilton (15 Minn. 26), 863.
Brooks v. Hubbard (3 Conn. 58), 1440.
Brooks v. Jameson (55 Mo. 505), 1446.
Brooks v. Paper Co. (94 Tenn. 701), 902, 1410.
Brooks v. Powers (15 Mass. 244), 960.
Brooks v. White (2 Metc. 283), 1420.
Brower v. Goodyer (88 Ind. 572), 905.
Brower v. Lewis (19 Barb. 574), 1325.
Brower v. Peabody (13 N. Y. 121), 166.
Brown v. Adair (104 Ala. 652), 1050.
Brown v. Bellows (4 Pick. 179), 212.
Brown v. Bigelow (10 Allen, 242), 1270, 1272, 1818.
Brown v. Billington (163 Pa. St. 76), 30, 580.
Brown v. Blydenburgh (7 N. Y. 141), 1453.
Brown v. Brooks (7 Jones, 93), 41.
Brown v. Browning (15 R. I. 422), 1058.
Brown v. Butchers' Bank (6 Hill, 443), 451.
Brown v. Carter (5 Ves. Jr. 862), 955.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Brown v. Castles (11 Cush. 348), 937.
Brown v. Church Co. (55 Ill. App. 615), 48.
Brown v. Doyle (69 Minn. 543), 1251.
Brown v. Duncan (10 B. & C. 93), 1046. 1051.
Brown v. Dunckel (46 Mich. 29), 1423.
Brown v. Edgington (2 Man. & Gr. 279), 1317, 1344, 1810, 1823.
Brown v. Elkington (8 M. & W. 132), 1270.
Brown v. Ellis (19 Ky. L. 2023), 1387.
Brown v. Emerson (66 Mo. App. 63), 1818.
Brown v. Fitch (43 Conn. 512), 599.
Brown v. Foree (7 B. Mon. 357), 953.
Brown v. Foster (113 Mass. 136), 665, 666.
Brown v. Foster (108 N. Y. 387), 1391.
Brown v. Hare (3 H. & N. 484), 740, 775, 787, 796.
Brown v. Harmon (29 App. Div. 31), 967.
Brown v. Haynes (52 Me. 580), 556, 585, 588, 597, 599, 630.
Brown v. Hitchcock (28 Vt. 452), 23.
Brown v. Johnson (10 Mees. & Wels. 331), 1135.
Brown v. Lally (— Minn. —), 1447, 1448.
Brown v. Leach (107 Mass. 364), 880.
Brown v. Montgomery (20 N. Y. 287), 869.
Brown v. Mudgett (40 Vt. 68), 184.
Brown v. Muller (L. R. 7 Ex. 319), 1746.
Brown v. McClanahan (9 Baxt. 347), 451.
Brown v. Norman (65 Miss. 369), 914, 918.
Brown v. O'Neal (95 Cal. 262), 960.
Brown v. Pierce (97 Mass. 46), 908. 981, 1302, 1794.
Brown v. Railroad Co. (33 Mo. 309), 178.
Brown v. Roland (92 Tex. 54), 334.
Brown v. Sanborn (21 Minn. 402), 324, 352.
Brown v. Scott (51 Pa. St. 357), 1435.
Brown v. Sharkey (93 Iowa, 157), 1749.
Brown v. Webb (20 Ohio, 389), 963.
Brown v. Weldon (27 Mo. App. 251), 1272.
Brown v. West (69 Vt. 440), 175.
Brown v. Whipple (58 N. H. 229), 426, 428.
Brown v. Woods (43 Tenn. 182), 1794.
Brown Grocery Co. v. Beckett (— Ky. —), 175.
Brown & Haywood Co. v. Wunder (64 Minn. 450), 319.
Brownell v. Chapman (84 Iowa, 504), 1779, 1790.
Brownell Car Co. v. Barnard (116 Mo. 667), 1482.
Brownfield v. Johnson (128 Pa. St. 254), 716, 1158.
Browning v. Hamilton (42 Ala. 484), 714.
Browning v. Simons (17 Ind. App. 45), 1633, 1690.
Brownlee v. Bolton (44 Mich. 218), 1641.
Brua's Appeal (55 Pa. St. 250), 1031, 1032.
Bruce v. Pearson (3 Johns. 534), 242, 746, 1161.
Bruce v. Ruler (2 Man. & Ry. 3), 869.
Bruce v. Tolton (4 App. R. 144), 228.
Bruggerman v. Hoerr (7 Minn. 337), 974.
Brumbaugh v. Richcreek (127 Ind. 240), 81, 950.
Brunswick v. Valleau (50 Iowa, 120), 1013. 1023.
Brunswick, etc. Co. v. Hoover (95 Pa. St. 508), 600.
Bryan v. Brazil (52 Iowa, 350), 1419.
Bryan v. Lewis (Ry. & Moo. 386), 203.
Bryan v. Robert (1 Strob. Eq. 335), 1719.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Bryans v. Nix (4 M. & W. 775), 728, 736.
Bryant v. Booze (55 Ga. 438), 247.
Bryant v. Crosby (36 Me. 562), 40.
Bryant v. Crosby (40 Me. 9), 1242, 1247.
Bryant v. Isburgh (13 Gray, 607), 804, 816, 1805.
Bryant v. Moore (26 Me. 84), 1281.
Bryant v. Pember (45 Vt. 487), 832.
Bryant v. Pennell (61 Me. 108), 636.
Bryant v. Richardson (12 Jur. 300), 132.
Bryant v. Smith (87 Mich. 525), 237, 263.
Bryant v. Thesing (46 Neb. 244), 1070, 1077.
Bryant v. Western Union Tel. Co. (17 Fed. R. 825), 1031.
Bryson v. Haley (68 N, H. 337), 1027.
Buchanan v. Kauffman (65 Tex. 235), 1798.
Buchanan v. Smith (83 U. S. 277), 1540.
Buck v. Pickwell (27 Vt. 157), 336, 439.
Buckley v. Furniss (15 Wend. 137), 1542, 1571, 1577.
Buckley v. Furniss (17 Wend. 504), 1602.
Bucklin v. Davidson (155 Pa. St. 362), 1106.
Buckman v. Levi (3 Camp. 414), 748, 1183.
Buckmaster v. Consumers Ice Co. (5 Daly, 313), 211.
Buckmaster v. Smith (22 Vt. 203), 636.
Buckstaff v. Russell & Co. (49 U. S. App. 253), 682.
Buckstaff v. Russell (79 Fed. R. 611), 1254.
Bucy v. Pitts Agricultural Works (89 Iowa, 464), 1259, 1260.
Budd v. Fairmaner (8 Bing. 48), 1259, 1276.
Budd v. Power (8 Mont. 380), 1302.
Buddle v. Green (3 H. & N. 906), 1118.
Budlong v. Cottrell (64 Iowa, 234), 569, 599, 603.
Buffalo Barb Wire Co. v. Phillips (67 Wis. 129), 1395.
Buffett v. Railroad Co. (40 N. Y. 176), 141.
Buffington v. Gerrish (15 Mass. 156), 924, 928.
Buffkin v. Baird (73 N. C. 283), 1713.
Bugg v. Towner (41 Ga. 315), 996.
Bugg v. Wertheimer-Schwartz Shoe Co. (64 Ark. 12), 904.
Bughman v. Central Bank (159 Pa. St. 94), 906.
Buhl Iron Works v. Tenton (67 Mich. 623), 964, 1193.
Bulkley v. Andrews (39 Conn. 70), 23.
Bulkley v. Morgan (46 Conn. 393), 908, 909, 1411.
Bull v. Bray (87 Cal. 286), 952, 972.
Bull v. Bull (43 Conn. 455), 1420.
Bull v. Robinson (10 Exch. 342), 1265, 1298.
Bullard v. Bank of Madison (107 Ga. 772), 549.
Bullard v. Wait (16 Gray, 55), 964.
Bullitt v. Farrar (42 Minn. 8), 875.
Bullock v. Sprowls (93 Tex. 188), 109.
Bullock v. Tschergi (13 Fed. R. 345), 365.
Bulwinkle v. Cramer (27 S. C. 376), 447, 1319.
Bumgardner v. Leavitt (35 W. Va. 194), 1727.
Bunce v. McMahon (6 Wyo. 24), 599.
Bunker v. Barrow (79 Me. 62), 1424.
Bunn v. Postell (107 Ga. 490), 80.
Bunney v. Poyntz (4 B. & Ad. 568), 1499.
Burbank v. Crooker (7 Gray, 158), 597, 601.
Burch v. Augusta R. R. Co. (80 Ga. 296), 446.

References are to sections: Vol. I. §§ 1-797; Vol. II, §§ 798-1850.

Burch v. Spencer (15 Hun, 504), 1356, 1357.
Burcham v. Griffeth (31 Neb. 778), 488, 492.
Burchinell v. Hirsh (5 Colo. App. 500), 896.
Burchinell v. Smidle (5 Colo. App. 417), 964.
Burchinell v. Weinberger (4 Colo. App. 6), 964.
Burditt v. Howe (69 Vt. 563), 565.
Burge v. Railroad Co. (32 Iowa, 101), 1148.
Burgert v. Borchert (59 Mo. 80), 963.
Burgess v. Chapin (5 R. I. 225), 1430.
Burgett v. Burgett (1 Ohio, 469), 947.
Burghart v. Angerstein (6 Car. & P. 690), 127, 128, 130, 132.
Burghart v. Hall (4 Mees. & W. 727), 127.
Burke v. Dunn (117 Mich. 430), 1474.
Burke v. Fry (44 Neb. 223), 175.
Burke v. Shannon (— Ky. —), 496, 498, 536.
Burks v. Hubbard (69 Ala. 379), 1787.
Burlington, etc. R. Co. v. Boestler (15 Iowa, 555), 1072.
Burnby v. Bollett (16 Mees. & W. 644), 1357.
Burnell v. Marvin (44 Vt. 277), 592.
Burnell v. Robertson (10 Ill. 282), 981, 982.
Burnet v. Bisco (4 Johns. 235), 263.
Burnham v. Ellmore (66 Mo. App. 617), 928.
Burnham v. Holt (14 N. H. 367), 189.
Burnham v. Sherwood (56 Conn. 229), 1277.
Burnham v. Winsor (5 Law R. 507), 1586.
Burnley v. Tufts (66 Miss. 48), 635.
Burns v. Fidelity Real Estate Co. (52 Minn. 31), 473.
Burr v. De La Vergne (102 N. Y. 415), 1729.
Burr v. Redhead, etc. Co. (52 Neb. 617), 1235, 1336.
Burr v. Wilson (13 Up. Can. Q. B. 478), 1586.
Burrell v. New York Salt Co. (14 Mich. 34), 1709.
Burrill v. Stevens (73 Me. 395), 901, 902.
Burrowes v. Locke (10 Ves. 470), 1223.
Burrows v. State (137 Ind. 474), 1433.
Burrows v. Whitaker (71 N. Y. 291), 499, 516, 519, 524, 529.
Burt v. Dewey (40 N. Y. 283), 1302, 1795.
Burt v. Myer (71 Md. 467), 1031.
Burtis v. Thompson (42 N. Y. 256), 1089, 1090.
Burton v. Baird (44 Ark. 556), 739.
Burton v. Curyea (40 Ill. 320), 491, 1194, 1507.
Burton v. Goodspeed (69 Ill. 237), 49.
Burton v. Great Northern Ry. Co. (9 Exch. 507), 263.
Burton v. Shotwell (13 Bush, 271), 253.
Burton v. Stewart (3 Wend. 236), 914, 940.
Burton v. Wells (30 Miss. 688), 1423.
Buschman v. Codd (52 Md. 202), 1843.
Bush v. Breinig (113 Pa. St. 310), 86.
Bush v. Collins (35 Kan. 535), 952.
Bush v. Fry (15 Ont. 122), 169.
Bush v. Holmes (53 Me. 417), 362.
Bush v. Railroad Co. (3 Mo. App. 62), 887.
Bush v. Roberts (111 N. Y. 278), 953.
Bushell v. Wheeler (15 Q. B. 442), 360, 373.
Bushnell v. Bicknell (17 Me. 344), 678.
Busk v. Davis (2 M. & S. 397), 702.
Busk v. Spence (4 Camp. 329), 654, 1145.
Bussing v. Rice (2 Cush. 48), 924, 929.
Busterud v. Farrington (36 Minn. 320), 875, 1843.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Butler v. Butler (77 N. Y. 472), 1091, 1092, 1106.
Butler v. Dorman (68 Mo. 298), 1446, 1447, 1448.
Butler v. Gannon (53 Md. 333), 600.
Butler v. Hicks (11 Sm. & M. 78), 719.
Butler v. Hildreth (5 Met. 49), 619, 909.
Butler v. Leighton (149 Pa. St. 351), 1484.
Butler v. School Dist. (149 Pa. St. 351), 660.
Butler v. Smith (35 Miss. 457), 1131.
Butler v. Thompson (92 U. S. 412), 434, 463.
Butler v. Woolcott (2 Bos. & Pul. N. R. 64), 1571.
Butt v. Ellett (19 Wall. 544), 202.
Butterfield v. Barber (20 R. I. 99), 884.
Butterfield v. Burroughs (1 Salk. 211), 1272.
Butterfield v. Byron (153 Mass. 517), 1102.
Butterfield v. Lathrop (71 Pa. St. 225), 23.
Butters v. Haughwout (42 Ill. 18), 924.
Butterworth v. McKinly (11 Humph. 206), 510, 755.
Butts v. Newton (29 Wis. 632), 178, 1455.
Buxton v. Lister (3 Atk. 383), 1722.
Byasse v. Reese (4 Metc. 372), 337, 361.
Byers v. Chapin (28 Ohio St. 300), 274, 1344.
Byles v. Colier (54 Mich. 1), 499, 502, 516.
Byrd v. Campbell Printing Press Co. (90 Ga. 542), 1240, 1349, 1384.
Byrd v. Hall (2 Keyes, 646), 905.
Byrd v. Rautman (85 Md. 414), 900, 908.
Byrne v. Stewart (124 Pa. St. 450), 936.
Byrne v. Van Tienhoven (5 C. P. Div. 344), 252, 257, 258.
Byrnes v. Volz (53 Minn. 110), 970.
Byrnside v. Burdett (15 W. Va. 702), 1302, 1306.
Bywater v. Richardson (1 Ad. & El. 508), 933, 1265, 1270.
Byxbee v. Dewey (— Cal. —). 964.
C. & C. Electric Motor Co. v. Frisbie (66 Conn. 67), 669.
Cabeen v. Campbell (30 Pa. St. 254), 1528, 1559.
Cabot v. Winsor (1 Allen, 546), 446, 1168.
Cadbury v. Nolen (5 Pa. St. 320), 964.
Cadogan v. Kennett (2 Cowp. 432), 945.
Cady v. Walker (62 Mich. 157), 1247.
Cady v. Zimmerman (20 Mont. 225), 492.
Cahen v. Platt (69 N. Y. 348), 1398, 1399, 1690, 1693, 1736, 1742.
Cahn v. Packet Co. (1 Q. B. 643), 166, 169.
Cain v. Bryant (12 Heisk. 45), 1467.
Cain v. McGuire (13 B. Mon. 340), 337.
Caines v. Smith (15 M. & W. 189), 1097.
Calahan v. Babcock (21 Ohio St. 281), 1528, 1571, 1572, 1579.
Calais Steamboat Co. v. Van Pelt (2 Black, 372), 163, 755.
Calcutta Co. v. De Mattos (32 L. J. Q. B. 322), 733, 742, 743, 1118, 1179, 1186.
Caldwell v. Ball (1 T. R. 205), 981, 1201.
Caldwell v. Bowen (80 Mich. 382), 923.
Caldwell v. Hall (49 Ark. 508), 1425.
Caldwell v. Henry (76 Mo. 254), 1841.
Caldwell v. Jones (115 Mich. 129), 138.
Caldwell v. Tutt (78 Tenn. 258), 1489.
Caldwell v. Wallace (4 Stew. & P. 282), 1270.
California Canneries Co. v. Scatena (117 Cal. 447), 451, 471.
Calkins v. Lockwood (17 Conn. 154), 381, 382.
Call v. Gray (37 N. H. 428), 964.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Call v. Seymour (40 Ohio St. 670), 599.
Callahan v. Young (90 Va. 574), 599, 603.
Callanan v. Brown (31 Iowa, 333), 1235, 1242.
Callen v. Thompson (3 Yerg. 475), 960.
Callmeyer v. Mayor (83 N. Y. 116), 1169.
Calloway v. Witherspoon (5 Ired. Eq. 128), 90.
Camden Iron Works v. Fox (34 Fed. R. 200), 1138, 1139.
Cameron v. Calberg (— Cal. —), 964.
Cameron v. Clarke (11 Ala. 259), 17, 18.
Cameron v. Mount (86 Wis. 477), 1223.
Cameron v. Wells (30 Vt. 633), 1129, 1131.
Camp v. Hamlin (55 Ga. 259), 1642.
Camp v. Thompson (25 Minn. 175), 960.
Campbell v. Alford (57 Tex. 159), 1194.
Campbell v. Atherton (92 Mo. 66), 569.
Campbell v. Fleming (1 Ad. & E. 40), 942.
Campbell v. Frankeno (65 Ind. 591), 1841.
Campbell v. Hassel (1 Stark. 233), 1459.
Campbell v. Hickok (140 Pa. St. 290), 620.
Campbell v. Kuhn (45 Mich. 513), 80.
Campbell v. Lambert (36 La. Ann. 35), 263.
Campbell v. Roddy (44 N. J. Eq. 244), 583, 647.
Campbell v. Segars (81 Ala. 259), 1050.
Campbell v. Young (9 Bush, 240), 1057.
Campbell Printing Press Co. v. Dyer (46 Neb. 830), 599, 603.
Campbell Printing Press Co. v. Henkle (19 D. C. 95), 614.
Campbell Printing Press Co. v. Marsh (20 Colo. 22), 1083, 1134, 1803.
Campbell Printing Press Co. v. Rockaway Pub. Co. (56 N. J. L. 676), 619.
Campbell Printing Press Co. v. Thorp (36 Fed. R. 414), 666.
Campbell Printing Press Co. v. Walker (114 N. Y. 7), 585.
Campbell Printing Press Co. v. Walker (22 Fla. 412), 564, 599, 603.
Campbellville Lbr. Co. v. Bradlee (96 Ky. 494), 1763.
Canadian Bank v. McCrea (106 Ill. 281), 545, 555.
Canda v. Wick (100 N. Y. 127), 1092.
Cangas v. Rumsey Mfg. Co. (37 Mo. App. 297), 228.
Canham v. Plano Mfg. Co. (3 N. Dak. 229), 1281, 1283, 1285, 1288.
Cannan v. Bryce (3 B. & Ald. 179), 1012.
Cannon v. Alsbury (1 A. K. Marsh. 76), 97.
Canterberry v. Miller (76 Ill. 355), 451.
Cantine v. Phillips (5 Harr. 428), 132.
Capehart v. Furman Farm Improvement Co. (103 Ala. 671), 741.
Capel v. Thornton (3 Car. & P. 352), 1446.
Capen v. Glass Co. (105 Ill. 185), 1736, 1737, 1742.
Capron v. Porter (43 Conn. 383), 960, 984.
Caraway v. Wallace (2 Ala. 542), 56, 145.
Carbon Block Coal Co. v. Murphy (101 Ind. 115), 1073.
Carbon Co. v. McMillin (119 N. Y. 46), 208.
Cardwell v. McClelland (35 Tenn. 159), 935.
Carey v. Burrus (20 W. Va. 571), 138.
Carey Lumber Co. v. Cain (70 Miss. 628), 179, 955.
Carhart v. Harshaw (45 Wis. 340), 950.
Carl v. McGonigal (58 Mich. 567), 928.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Carleton v. Jenks (47 U. S. App. 734), 1243, 1311, 1387.
Carleton v. Lombard (72 Hun, 254), 1259.
Carleton v. Lombard (149 N. Y. 137), 1258, 1346.
Carleton v. Woods (28 N. H. 290), 1004.
Carlisle v. United States (83 U. S. 147), 1024.
Carlisle v. Wallace (12 Ind. 252), 25.
Carll v. Emery (148 Mass. 32), 948.
Carlton v. Sumnar (4 Pick. 516), 549, 552.
Carlton v. Whitcher (5 N. H. 196), 1004.
Carman v. Smick (15 N. J. L. 252), 293.
Carnahan v. Hughes (108 Ind. 225), 1664.
Carney v. Barrett (4 Oreg. 171), 186.
Carney v. Carney (7 Baxt. 284), 960.
Carney v. Newberry (24 Ill. 203), 1148.
Carolan v. Brabazon (3 Jo. & Lat. 200), 804.
Carolee v. Handelis (103 Ga. 299), 1718.
Carondelet Iron Works v. Moore (78 Ill. 65), 1235, 1380.
Carpenter v. Carpenter (45 Ind. 142), 109. 119, 120.
Carpenter v. First Nat. Bank (119 Ill. 352), 1763.
Carpenter v. Galloway (73 Ind. 418), 352, 473.
Carpenter v. Graham (42 Mich. 191), 499, 516, 702, 709.
Carpenter v. Mayer (5 Watts, 483), 963.
Carpenter v. Medford (99 N. C. 495), 336.
Carpenter v. McClure (39 Vt. 9), 947.
Carpenter v. Rodgers (61 Mich. 384), 87.
Carpenter v. Scott (13 R. I. 477), 569, 588, 590, 599.
Carr v. Allatt (3 H. & N. 964), 202.
Carr v. Breese (81 N. Y. 584), 973.
Carr v. Clough (26 N. H. 280), 106, 109.
Carr v. Duval (14 Pet. 77), 228, 229, 233, 244.
Carr v. London, etc. Ry. Co. (L. R. 10 C. P. 307), 845.
Carr v. Moore (41 N. H. 131), 1818.
Carrier v. Sears (4 Allen, 336), 72.
Carroll v. Sweet (128 N. Y. 19), 1433.
Carson v. Baillie (19 Pa. St. 375), 1334.
Carson v. Browder (2 Lea, 701), 342.
Carstairs v. Kelley Co. (— Ky. App. —), 905.
Carstens v. Hanselman (61 Mich. 426), 184.
Carter v. Bingham (32 Up. Can. Q. B. 615), 227, 228.
Carter v. Crick (4 H. & N. 412), 1320.
Carter v. Harden (78 Me. 528), 878.
Carter v. Kingman (103 Mass. 517), 583, 628, 630.
Carter v. Scargill (L. R. 10 Q. B. 564), 1075.
Carter v. Smith (23 Wis. 497), 909.
Carter v. Toussaint (5 B. & Ald. 855), 385, 386.
Carter v. Wallace (32 Hun, 384), 677.
Carter v. Willard (19 Pick. 1), 380, 491, 788, 1193.
Carter White Lead Co. v. Kimlin (47 Neb. 409), 264.
Cartwright v. Bate (1 Allen, 514), 184.
Cartwright v. Wilmerding (24 N. Y. 521), 1585, 1587.
Carver v. Lane (4 E. D. Smith, 168), 400.
Carver v. State (69 Ind. 61), 1052.
Carver v. Todd (48 N. J. Eq. 102), 955.
Cary v. Bancroft (14 Pick. 315), 1437.
Cary v. Gruman (4 Hill, 625), 1805, 1817.
Cary v. Hotailing (1 Hill, 311), 892.
Case v. Green (5 Watts, 262), 1139.
Case v. Hall (24 Wend. 102), 931, 1795.
Case v. L'Oeble (81 Fed. R. 582), 580.
Case v. Phelps (39 N. Y. 164), 973.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Case v. Seass (44 Mich. 195), 1431.
Case v. Stevens (137 Mass. 551), 1842.
Case Mfg. Co. v. Garven (45 Ohio St. 289), 599, 646.
Case Plow Works v. Niles & Scott Co. (90 Wis. 590), 1254, 1259, 1260, 1349, 1817, 1818.
Case Plow Works v. Niles & Scott Co. (107 Wis. 9), 1736.
Case Plow Works v. Ross (74 Mo. App. 437), 914, 924.
Case Threshing M. Co. v. Haven (65 Iowa, 359), 1817.
Case Threshing Mach. Co. v. Smith (16 Oreg. 381), 449, 450.
Case, J. I., Thresher Co. v. Vennum (4 Dak. 92), 1384.
Cash v. De Long (— Ky. —), 1835, 1844.
Cason v. Cheely (6 Ga. 554), 321, 324.
Cass v. Gunnison (68 Mich. 147), 702.
Cass v. Perkins (23 Ill. 382), 963.
Cassidy v. Daly (11 W. Dig. 222), 1502.
Castanola v. Mo. Pac. Ry. Co. (24 Fed. R. 267), 1564.
Castle v. Playford (L. R. 5 Ex. 165), 1414.
Castle v. Playford (L. R. 7 Ex. 98), 529.
Castle v. Sworder (6 H. & N. 828), 369.
Castro v. Illies (22 Tex. 479), 952.
Caswell v. Hunton (87 Me. 277), 937.
Caswell v. Jones (65 Vt. 457), 960.
Catlin v. Tobias (26 N. Y. 217), 242, 1162.
Catling v. King (5 Ch. Div. 660), 434, 435.
Catterall v. Hindle (L. R. 1 C. P. 187), 1455.
Calkins v. Fry (35 Conn. 170), 86, 87.
Caulkins v. Hellman (47 N. Y. 449), 356, 392, 393.
Cave v. Hastings (7 Q. B. Div. 125), 426, 428.
Cawston v. Sturgis (29 Oreg. 331), 875.
Cayton v. Hardy (27 Mo. 536), 144.
Cayuga Nat. Bank v. Daniels (47 N. Y. 631), 792.
Caywood v. Timmons (31 Kan. 394), 499, 508, 516.
Cefalw v. Fitzsimmons-Derrig Co. (65 Minn. 480), 1377.
Central Bank v. Empire Stone Co. (26 Barb. 23), 1048.
Central Lith. & Eng. Co. v. Moore (75 Wis. 170), 52, 314, 754.
Central Trust Co. v. Arctic Mfg. Co. (77 Md. 202), 600, 1384, 1395.
Central Trust Co. v. Marietta, etc. R. Co. (48 Fed. R. 868), 603.
Chadsey v. Greene (24 Conn. 562), 1272.
Chadwick v. Butler (28 Mich. 349), 1787.
Challenge Wind Mill Co. v. Kerr (93 Mich. 328), 254, 1255.
Challoner v. Boyington (91 Wis. 27), 1425.
Chalmere, Ex parte (L. R. 8 Ch. App. 289), 1093, 1094, 1513, 1518.
Chamberlain v. Scott (33 Vt. 80), 1713.
Chamberlain v. Smith (44 Pa. St. 431), 32, 580.
Chamberlin v. Fuller (59 Vt. 247), 881, 914, 934.
Chamber of Commerce v. Sollitt (43 Ill. 519), 1089.
Chambers v. Board of Education (60 Mo. 370), 755, 761.
Chambers v. Davidson (L. R. 1 Pr. Coun. 296), 1477. 1481.
Chambers v. Lancaster (160 N. Y. 342), 360, 1387.
Chambers v. Miller (7 Watts, 63), 1456.
Chambers v. Short (79 Mo. 204), 1447, 1448.
Chambers v. Union Nat. Bank (78 Pa. St. 205), 1303.
Chamblee v. McKenzie (31 Ark. 155), 527.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Champion v. Plummer (4 B. & P. 252), 430, 434.
Champion v. Wood (79 Cal. 17), 872.
Champion Machine Co. v. Mann (42 Kan. 372), 823, 1384, 1385, 1386.
Champlin v. Rogers (1 East. 92), 381.
Champlin v. Rowley (13 Wend. 259), 513, 1162.
Chancellor v. Wiggins (4 B. Mon. 201), 1302, 1795.
Chandelor v. Lopus (2 Cro. Jac. 2), 1334.
Chandler, In re (13 Am. L. Reg. 310), 1031, 1034.
Chandler v. Fulton (10 Tex. 2), 1537, 1540, 1564, 1566, 1568.
Chandler v. Glover (32 Pa. St. 509), 121.
Chandler v. Robertson (9 Dana, 291), 1130.
Chandler v. Simmons (97 Mass. 508), 92, 109, 118, 508.
Chanter v. Hopkins (4 M. & W. 399), 1155, 1207, 1208, 1224, 1259, 1311, 1333, 1347, 1349.
Chapin v. Cram (40 Me. 561), 202.
Chapin v. Dobson (78 N. Y. 74), 1255.
Chapin v. Shafer (49 N. Y. 407), 106, 108, 112, 114, 121.
Chaplin v. Rogers (1 East, 192), 361, 386.
Chapman v. Cole (12 Gray, 141), 272.
Chapman v. Hughes (61 Miss. 339), 132.
Chapman v. Ingram (30 Wis. 290), 1638.
Chapman v. Lathrop (6 Cow. 110), 549, 1121, 1407.
Chapman v. Morton (11 Mees. & W. 534), 1387, 1392.
Chapman v. Murch (19 Johns. 290), 1235.
Chapman v. Kansas C. etc. Ry. Co. (146 Mo. 481), 1702.
Chapman v. Searle (3 Pick. 38), 1487.
Chapman v. Shepard (39 Conn. 413), 702, 708, 711.
Chapman v. Speeler (14 Q. B. 621), 1301, 1309.
Chapman v. Weimer (4 Ohio St. 481), 202.
Chappell v. Raymond (20 La. Ann. 277), 1458.
Chapple v. Cooper (13 Mees. & W. 252), 130, 132.
Charles v. Carter (96 Tenn. 607), 781, 1375.
Chase v. Burkholder (18 Pa. St. 48), 1004.
Chase v. City of Lowell (7 Gray, 33), 431.
Chase v. Ingalls (122 Mass. 381), 569, 583, 588, 590.
Chase v. Ralston (30 Pa. St. 539), 964.
Chase v. Washburn (1 Ohio St. 244), 26.
Chase v. Willard (67 N. H. 369), 1805.
Chase Elevator Co. v. Boston Tow B. Co. (155 Mass. 211), 1380.
Chatham Furnace Co. v. Moffatt (147 Mass. 403), 875.
Chemical Electric Co. v. Howard (148 Mass. 352), 834.
Cheney v. Palmer (6 Cal. 119), 956, 964.
Cheney v. Cook (7 Wis. 413), 244, 253.
Cheney v. Duke (10 Gill & J. 11), 1013.
Cherry v. Arthur (5 Wash. 787), 624, 646.
Cherry v. Smith (3 Humph. 19), 264.
Cherry Valley Iron Works v. Florence Co. (64 Fed. R. 569), 1144-1147.
Chesapeake Club v. State (63 Md. 446), 55.
Cheshire v. Barrett (4 McCord, 241), 101, 121.
Chester v. Bank (16 N. Y. 343), 40.
Chestnut v. Harbaugh (78 Pa. St. 473), 1053.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Chicago v. Tilley (103 U. S. 146), 1097.
Chicago, etc. R. Co. v. Dane (43 N. Y. 240), 244, 245, 263.
Chicago, Mil. & St. P. Ry. Co. v. Hoyt (149 U. S. 1), 1104.
Chicago Packing & P. Co. v. Tilton (87 Ill. 547), 1345.
Chicago Ry. Equipment Co. v. Merchants' Bank (136 U. S. 268). 650.
Chicago, etc. R. Co. v. Painter (15 Neb. 394), 1571.
Chicago, etc. Ry. Co. v. Titterington (84 Tex. 218), 870.
Chickering v. Bastress (130 Ill. 206), 21, 35, 46, 49.
Chidell v. Galsworthy (6 C. B. 470), 202.
Child v. Allen (33 Vt. 476), 619.
Childers v. Bowen (68 Ala. 221), 1452.
Childers v. Talbott (4 N. M. 336), 288.
Childs v. O'Donnell (84 Mich. 533), 681, 1245, 1380, 1382.
Childs v. Merrill (63 Vt. 463), 884.
Chinery v. Viall (5 Hurls. & Norm. 287), 1786.
Chippendale v. Thurston (4 Car. & P. 101), 264.
Chism v. Woods (Hard. 531), 1302.
Choice v. Moseley (1 Bailey L. 136), 1442.
Choteau v. Jones (11 Ill. 300), 977.
Christian v. Greenwood (23 Ark. 258), 955.
Christie's Appeal (85 Pa. St. 463), 580.
Christy v. Sullivan (50 Cal. 337), 835.
Chrisler v. Canaday (90 N. Y. 272), 936.
Chubbuck v. Cleveland (37 Minn. 466), 878.
Church v. Chapin (35 Vt. 223), 957.
Church v. Landers (10 Wend. 79), 178.
Church v. Muir (33 N. J. L. 318), 947.
Church v. McLeod (58 Vt. 541), 603.
Church v. Proctor (66 Fed. R. 240), 996, 1041.
Churchill v. Holton (38 Minn. 519), 1160, 1161.
Churchill v. Hulbert (110 Mass. 42), 627.
Churchill v. Merchants' Bank (19 Pick. 532), 1135.
Churchill v. Price (44 Wis. 540), 1378.
Chynoweth v. Tenny (10 Wis. 397), 202.
Cincinnati v. Cameron (33 Ohio St. 336), 1079.
Cincinnati Cooperage Co. v. Gaul (170 Pa. St. 545), 906.
Cincinnati Safe Co. v. Kelly (54 Ark. 476), 585, 605.
Cincinnati Oyster Co. v. Nat. Bank (51 Ohio St. 106), 1434.
Citizens' Bank v. Williams (128 N. Y. 177), 955.
Citizens' St. Ry. Co. v. Robbins (144 Ind. 671), 1787.
City Bank v. Barrow (5 App. Cas. 664), 169.
City Ry. Co. v. Basshor (82 Md. 397), 1251, 1350.
City Nat. Bank v. Hamilton (34 N. J. Eq. 158), 973.
City Bank v. Rome, etc. R. Co. (44 N. Y. 136). 1566.
City of Elgin v. Schoenberger (59 Ill. App. 384). 1351.
Claflin v. Carpenter (4 Metc. 580), 336, 337.
Claflin v. Furniture Co. (58 N. J. L. 379), 564.
Claflin v. Mess (30 N. J. Eq. 211), 974.
Claflin v. Rosenberg (42 Mo. 439), 960, 963.
Claflin v. Taussig (7 Hun, 223), 1428.
Claghorn v. Lingo (62 Ala. 230), 1244.
Clampet v. Bells (39 Minn. 272), 434, 437.
Clapp v. Thayer (112 Mass. 296), 1168.
Clare v. Maynard (7 Car. & P. 741), 1817.
Claringbould v. Curtis (21 L. J. Ch. 541), 1719.
Clark v. Baker (5 Metc. 452), 912, 1398.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Clark v. Baker (11 Metc. 186), 1158.
Clark v. Cox (118 Mo. 652), 951.
Clark v. Dales (20 Wend. 61), 1407.
Clark v. Des Moines (19 Iowa, 199), 191.
Clark v. Draper (19 N. H. 419), 493, 499, 1481, 1515.
Clark v. Fey (121 N. Y. 470), 653, 1139.
Clark v. Flint (22 Pick. 231), 924, 1724.
Clark v. French (23 Me. 221), 960, 974.
Clark v. Greeley (62 N. H. 394), 493, 499, 541.
Clark v. Griffith (24 N. Y. 595), 711.
Clark v. Hayward (51 Vt. 14), 636.
Clark v. Hill (117 N. C. 11), 569.
Clark v. Houghton (12 Gray, 38), 812.
Clark v. Jack (7 Watts, 375), 32, 580, 581.
Clark v. Johnson Foundry Co. (42 S. W. R. 844), 1106.
Clark v. Lee (78 Mich. 221), 960.
Clark v. Lindsay (19 Mont. 1), 653, 1136.
Clark v. Marsiglia (1 Denio, 317), 1091, 1699.
Clark v. Mayor of N. Y. (4 N. Y. 338), 1713.
Clark v. Moore (3 Mich. 55), 1162.
Clark v. Mumford (62 Tex. 531), 1798.
Clark v. Murphy (164 Mass. 490), 1447, 1448.
Clark v. Nichols (107 Mass. 547), 307, 324.
Clark v. Rice (46 Mich. 308), 663, 667, 680, 814.
Clark v. Richards Lumber Co. (68 Minn. 282), 603.
Clark v. Ricker (14 N. H. 44), 1004.
Clark v. Smith (88 Ill. 298), 1447, 1448.
Clark v. Truitt (183 Ill. 239), 1718.
Clark v. Tucker (2 Sandf. 157), 416.
Clark v. Van Court (100 Ind. 113), 102, 107, 109.
Clark v. Wheeling Steel Works (3 U. S. App. 358), 1144.
Clark's Cove Guano Co. v. Dowling (85 Ala. 142), 1050.
Clarke v. Brown (77 Ga. 606), 999.
Clarke v. Crandall (27 Barb. 73), 1097.
Clarke v. Foss (7 Biss. 540), 1032.
Clarke v. Hutchins (14 East, 475), 748, 1183.
Clarke v. Spence (4 Ad. & El. 448), 510, 753, 762.
Clarke v. Westrope (18 C. B. 765), 209, 213, 674.
Clarkson v. Stevens (106 U. S. 505), 755.
Clary v. Frayer (8 Gill & J. 398), 964.
Clason v. Bailey (14 Johns. 484), 449, 455, 456, 464.
Clay v. Allen (63 Miss. 426), 1031, 1032.
Clay v. Yates (1 Hurl. & Norm. 73), 301.
Clayton v. Andrews (4 Burrows, 2101), 296, 297, 299, 305.
Clayton v. Hester (80 N. C. 275), 599.
Cleary v. Folger (84 Cal. 316), 629.
Clem v. Newcastle R. Co. (9 Ind. 488), 872, 874.
Clemens v. Clemens (28 Wis. 637), 947, 948.
Clement Mfg. Co. v. Meserole (107 Mass. 362), 1092, 1690, 1790.
Clements v. Smith (9 Gill, 156), 1431.
Clementson v. Grand Trunk Ry. Co. (42 Up. Can. Q. B. 263), 1606.
Cleveland v. Pearl (63 Vt. 127), 1407.
Cleveland v. Shoeman (40 Ohio St. 176), 169.
Cleveland v. Sterrett (70 Pa. St. 204), 839, 1136, 1850.
Cleveland v. Williams (29 Tex. 204), 483, 496, 519, 714.
Cleveland Mach. Works v. Lang (67 N. H. 348), 597, 649, 650.
Cleveland Rolling Mill v. Rhodes (121 U. S. 255), 1090, 1138, 1144, 1145, 1155, 1158, 1161.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Clews v. Jamieson (38 C. C. A. 473), 203.
Clifford, In re (2 Sawy. 428), 388. 456.
Clift v. Moses (112 N. Y. 426), 1422.
Clinan v. Cooke (1 Sch. & Lefroy, 22), 426.
Clinton Nat. Bank v. Studemann (74 Iowa, 104). 485, 488, 492.
Clipsham v. Vertue (5 Q. B. 265), 861.
Clodfelter v. Hulett (72 Ind. 148), 1664.
Cloke v. Shafroth (137 Ill. 393), 29, 711, 716.
Clopton v. Elkin (49 Miss. 95). 1004.
Clore v. Robinson (100 Ky. 402), 1633.
Close v. Crossland (47 Minn. 500), 1302, 1304, 1306, 1794, 1795, 1797, 1805.
Cloud v. Greasley (125 Ill. 313), 433, 441.
Cloud v. Moorman (18 Ind. 40), 492, 708.
Clough v. London & N. W. Ry. Co. (L. R. 7 Ex. 26), 908.
Clough v. Patrick (37 Vt. 421), 834.
Clough v. Whitcomb (105 Mass. 482), 1449.
Clow v. Borst (6 Johns. 37), 1466.
Clow v. Woods (5 S. & R. 275), 580, 960, 964, 966.
Clute v. Lovelace (68 Cal. 254), 197.
Clute v. Steele (6 Nev. 335), 963.
Clyde Cycle Co. v. Hargreaves (78 L. T. 296), 132.
Coates v. Early (46 S. C. 220), 274.
Coates v. Railton (6 B. & Cress. 422), 1575, 1577.
Coates v. Wilson (5 Esp. 152). 132.
Coats v. Chaplin (3 Ad. & El., N. S., 483), 738.
Cobb v. Buswell (37 Vt. 337), 649.
Cobb v. Hall (33 Vt. 233), 1089, 1090.
Cobb v. Haskell (14 Me. 303), 964.
Cobb v. Prell (5 McCrary, 80), 1031, 1032, 1034.
Cobb v. Reed (2 Stew. 444), 1125.
Coburn v. Odell (30 N. H. 540), 1004.
Coburn v. Pickering (3 N. H. 415), 960.
Cochran v. Stewart (21 Minn. 435), 908.
Cochran's Will, Case of (1 T. B. Mon. 264), 68.
Cockburn v. Ashland Lbr. Co. (54 Wis. 619), 1736, 1762.
Cocke v. Campbell (13 Ala. 286), 1281.
Cocke v. Chapman (2 Eng. 197), 380.
Cocker v. Franklin Mfg. Co. (3 Sumn. 530), 1129, 1131.
Cockrell v. Thompson (85 Mo. 510), 1032.
Coddington v. Goddard (16 Gray, 436). 430, 434, 446, 448, 451, 456, 463, 464, 465.
Coddington v. Pale-ologo (L. R. 2 Exch. 193), 1145.
Codman v. Freeman (3 Cush. 306), 202.
Coe v. Tough (116 N. Y. 273), 423.
Coe v. Wagar (42 Mich. 49), 17, 1411.
Coffey v. Quebec Bank (20 Up. Can. C. P. 110), 714.
Coffin v. State (144 Ind. 578), 1760, 1762.
Coffman v. Hampton (2 Watts & Serg. 377), 351, 1455.
Coffman v. Williams (51 Tenn. 233), 1787, 1820.
Coggill v. Railroad Co. (3 Gray. 545), 546, 554, 599. 740, 1437.
Coghill v. Boring (15 Cal. 213), 915, 919.
Cogley v. Cushman (16 Minn. 397), 95, 106, 116.
Cohen v. Candler (79 Ga. 427), 603.
Cohen v. Knox (90 Cal. 266), 955.
Cohen v. Pemberton (53 Conn. 221), 1160.
Cohn v. Ammidown (120 N. Y. 398), 1302, 1307.
Cohn v. Broadhead (51 Neb. 834), 898.
Cohn v. Heimbauch (86 Wis. 176), 1053, 1054.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Cohn v. Mitchell (115 Ill. 124), 1727.
Colcock v. Ferguson (3 Desaus. 482), 124.
Colcord v. Dryfus (1 Okla. 228), 809, 964, 1181.
Colcord v. McDonald (128 Mass. 470), 630.
Cole v. Berry (42 N. J. L. 308), 569, 599, 1482.
Cole v. Bryant (73 Miss. 297), 723, 981.
Cole v. Cassidy (138 Mass. 437), 875, 878.
Cole v. Hines (81 Md. 476), 610.
Cole v. Northwestern Bank (L. R. 9 C. P. 470), 169.
Cole v. Pennoyer (14 Ill. 158), 95.
Cole v. Ross (9 B. Mon. 393), 1440.
Cole v. Smith (26 Colo. 506), 937, 938.
Cole v. Swanston (1 Cal. 51), 1121, 1407.
Cole v. Terrell (71 Tex. 549), 970.
Cole v. Tyler (65 N. Y. 73), 972.
Cole v. White (26 Wend. 511), 960.
Coleman v. Applegarth (68 Md. 21), 257.
Colerick v. Hooper (3 Ind. 316), 437.
Coles v. Kennedy (81 Iowa, 360), 936.
Coles v. Trecothick (9 Ves. 234), 426.
Collender Co. v. Marshall (47 Vt. 232), 569.
Colles v. Swensberg (90 Mich. 223), 682.
Collette v. Weed (68 Wis. 428), 1248, 1255.
Collins v. Canty (6 Cush. 415), 1080.
Collins v. Delaporte (115 Mass. 74), 1089, 1091.
Collins v. Houston (138 Pa. St. 481), 541.
Collins v. Jackson (54 Mich. 186), 936, 1242.
Collins v. Newton (7 Baxt. 269), 1448.
Collins v. Wilhoit (35 Mo. App. 585), 603.
Collins v. Wilhoit (108 Mo. 451), 599.
Collyer v. Moulton (9 R. I. 90), 804.
Colorado Springs Live Stock Co. v. Godding (20 Colo. 249), 731, 765, 1186.
Colt v. Owens (90 N. Y. 368), 1132, 1787.
Colton v. Stanford (82 Cal. 351), 879.
Columbia Club v. McMaster (35 S. C. 1), 55.
Columbia Rolling Co. v. Beckett Foundry Co. (55 N. J. L. 391), 660, 681.
Columbian Iron Works v. Douglas (84 Md. 44), 1154, 1209, 1210, 1814.
Columbus Buggy Co. v. Turley (73 Miss. 529), 601.
Colvin v. Weedman (50 Ill. 311), 1130.
Colvins v. Williams (3 H. & J. 38), 331.
Colwell v. Keystone Iron Co. (36 Mich. 51), 526.
Comaita v. Kyle (19 Nev. 38), 960.
Coman v. Thompson (47 Mich. 22), 342.
Combs v. Bateman (10 Barb. 573), 414.
Comer v. Cunningham (77 N. Y. 391), 599, 890, 891.
Comey v. Pickering (63 N. H. 126), 150, 151.
Comfort v. Kiersted (26 Barb. 472), 755, 764.
Commercial Nat. Bank v. Gillette (90 Ind. 268), 714.
Commercial Bank v. Hurt (99 Ala. 130), 1507.
Commercial Bank v. Kortright (22 Wend. 348), 162.
Commercial Bank v. Pfeiffer (108 N. Y. 242), 792.
Commercial Nat. Bank v. Pirie (82 Fed. R. 799), 905, 924.
Commins v. Scott (L. R. 20 Eq. 11), 435.
Commonwealth v. Call (21 Pick. 515), 895.
Commonwealth v. Clark (14 Gray, 367), 16.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Commonwealth v. Davis (12 Bush, 240), 13.
Commonwealth v. Devlin (141 Mass. 423), 543.
Commonwealth v. Ewing (145 Mass. 119), 55.
Commonwealth v. Fleming (130 Pa. St. 138), 739, 740, 777, 793, 1029.
Commonwealth v. Hantz (2 Pa. St. 334), 122.
Commonwealth v. Harley (7 Metc. 462), 895.
Commonwealth v. Hess (148 Pa. St. 98), 483, 485, 492, 1029.
Commonwealth v. Jeffries (7 Allen, 548), 887.
Commonwealth v. Miller (131 Pa. St. 118), 54.
Commonwealth v. Packard (5 Gray, 101), 12.
Commonwealth v. Pomphret (137 Mass. 564), 55.
Commonwealth v. Savings Bank (137 Mass. 431), 38, 688, 689.
Commonwealth v. Smith (10 Allen, 448), 141.
Commonwealth v. Smith (102 Mass. 144), 55.
Commonwealth v. Vieth (155 Mass. 442), 54.
Commonwealth v. Warren (160 Mass. 533), 54.
Commonwealth v. Wood (142 Mass. 459), 937.
Commonwealth v. Worcester (126 Mass. 256), 54.
Comstock v. Affoelter (50 Mo. 411), 1182.
Comstock v. Sanger (51 Mich. 497), 207, 1392, 1659.
Comstock v. Scales (7 Wis. 159), 202.
Comtoir d'Escompte v. Dresbach (78 Cal. 15), 1433.
Conable v. Lynch (45 Iowa, 84), 49.
Conant v. National State Bank (121 Ind. 323), 1254, 1347.
Conard v. Atlantic Ins. Co. (1 Pet. 386), 166, 1201.
Conawingo Refining Co. v. Cunningham (75 Pa. St. 138), 1136.
Conemaugh Gas Co. v. Jackson Farm Gas Co. (186 Pa. St. 443), 1721.
Congar v. Chamberlain (14 Wis. 258), 1248.
Congdon v. Kendall (53 Neb. 282), 741.
Conger v. Railroad Co. (17 Wis. 477), 1437.
Congreve v. Evetts (10 Exch. 298), 202.
Conklin v. Osborn (7 Ind. 553), 103, 121.
Conley v. Sims (71 Ga. 161), 1050.
Conly v. Friedman (6 Colo. App. 160), 964.
Conn v. Coburn (9 N. H. 368), 132.
Connecticut Mut. L. Ins. Co. v. Smith (117 Mo. 261), 953, 954.
Connecticut Valley, etc. Co. v. Trustees (32 App. Div. 83), 673.
Conner v. Henderson (15 Mass. 319), 914, 916.
Conner v. Robertson (37 La. Ann. 814), 203, 1032.
Connersville v. Wadleigh (7 Blackf. 102), 1272.
Connihan v. Thompson (111 Mass. 270), 909.
Connor v. Black (119 Mo. 126), 1032.
Connor v. Stanley (72 Cal. 556), 64.
Conrad v. Fisher (37 Mo. App. 353), 1512.
Conroe v. Birdsall (1 Johns. Cas. 127), 124.
Conrow v. Little (115 N. Y. 387), 909.
Consolidated Milling Co. v. Fogo (104 Wis. 92), 901, 905, 906.
Constania, The (3 Eng. Adm. 6 Rob. 321), 1543.
Consumers' Ice Co. v. Webster (32 N. Y. App. Div. 592), 267.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Converse v. Blumrich (14 Mich. 109), 863, 875.
Converse v. Sickles (146 N. Y. 200), 928.
Conway v. Bush (4 Barb. 564), 1437.
Conyers v. Ennis (2 Mason, 236), 1594.
Cook v. Barnes (36 N. Y. 520), 1429.
Cook v. Brandeis (3 Metc. 555), 1643, 1682.
Cook v. Corthell (11 R. I. 482), 202.
Cook v. Deaton (3 Car. & P. 114), 127, 128.
Cook v. Gill (83 Md. 177), 882.
Cook v. Gilman (34 N. H. 556), 915.
Cook v. Gray (6 Ind. 335), 1136.
Cook v. Johnson (12 N. J. Eq. 51), 970, 971, 972.
Cook v. Logan (7 Iowa, 141), 714.
Cook v. Mann (6 Colo. 21), 964.
Cook v. Moseley (13 Wend. 277), 1836.
Cook v. Van Horne (76 Wis. 520), 485, 496.
Cook Mfg. Co. v. Randall (62 Iowa, 245), 1755.
Cooke v. Cooke (43 Md. 522), 970.
Cooke v. Ludlow (2 Bos. & P. [N. R.] 119), 740.
Cooke v. Millard (5 Lans. 246), 324.
Cooke v. Millard (65 N. Y. 352), 304, 305, 349, 371.
Cooke v. Oxley (3 T. R. 653), 245, 252.
Cool v. Peters Lumber Co. (87 Ind. 531), 336.
Cooley v. Gillan (54 Conn. 80), 564.
Cooley v. Perrine (12 Vroom, 322), 1281, 1294.
Cooley v. Willard (34 Ill. 68), 1453.
Coolidge v. Brigham (1 Metc. 547), 915.
Coolidge v. Heneky (11 Oreg. 327), 953.
Coombs v. Emery (14 Me. 404), 1050.
Coombs v. Railway Co. (3 H. & N. 510), 369.
Coon v. Spaulding (47 Mich. 162), 1133.
Cooney v. Wade (4 Humph. 444), 1456.
Cooper, Ex parte (11 Ch. Div. 68), 1499, 1582, 1583, 1602.
Cooper v. Bill (3 H. & C. 722), 515, 1495.
Cooper v. Elston (7 T. R. 14), 307, 400.
Cooper v. Lansing Wheel Co. (94 Mich. 272), 264.
Cooper v. Lovering (106 Mass. 77), 937.
Cooper v. Macdonald (7 Ch. Div. 293), 135.
Cooper v. McNamara (92 Iowa, 243), 186.
Cooper v. Schlesinger (111 U. S. 148), 875.
Cooper v. Shepherd (3 Com. B. 266), 56.
Cooper v. Smith (15 East, 103), 427.
Cooper v. State (37 Ark. 412), 13.
Copas v. Provision Co. (73 Mich. 541), 1242, 1356, 1357, 1358.
Cope v. Rowlands (2 Mees. & Wels. 149), 1046, 1047.
Copenrath v. Kienby (83 Ind. 18), 76.
Copland v. Bosquet (4 Wash. C. C. 588), 543.
Coplay Iron Co. v. Pope (108 N. Y. 232), 1391, 1392, 1395.
Coquard v. Wernse (100 Mo. 131), 29.
Corbet v. Wolford (48 Md. 426), 286, 288.
Corbett v. Brown (8 Bing. 33), 876.
Corbett v. Wolford (84 Md. 426), 361.
Corbin v. Tracy (34 Conn. 325), 1729.
Corbit v. Smith (7 Iowa, 60), 74.
Corbitt v. Salem Gas Light Co. (6 Oreg. 405), 442.
Corcoran v. White (146 Mass. 329), 228.
Cordage Co. v. Wohlhuter (71 Minn. 484), 1818.
Corder v. Williams (40 Iowa, 582), 970.
Cordes v. Miller (39 Mich. 581), 1099.
Corey v. Burton (32 Mich. 30), 95, 113.
Corey v. Corey (19 Pick. 29), 186.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Corgan v. Frew (39 Ill. 31), 964.
Cork Distilleries Co. v. Railway Co. (L. R. 7 H. L. 269), 736, 787.
Cornell University v. Fiske (136 U. S. 152), 143.
Cornforth v. Rivett (2 M. & Sel. 510), 1438.
Corning v. Abbott (54 N. H. 469), 1018, 1046, 1051.
Corning v. Burden (15 How. 270), 834.
Corning v. Colt (5 Wend. 253), 746, 1161.
Corning v. Strong (1 Ind. 329), 1455.
Corninger v. Crocker (62 N. Y. 151), 1137.
Cornish v. Abington (4 H. & N. 549), 845.
Cornwall v. Mix (— Idaho, —), 964.
Corpe v. Overton (10 Bing. 252), 109.
Cort v. Ambergate N. & B. & E. Junction R. Co. (17 Q. B. 127), 1090, 1092, 1097, 1106.
Cortland Mfg. Co. v. Platt (83 Mich. 419), 896, 909.
Cortland Wagon Co. v. Sharvey (52 Minn. 216), 603.
Cory v. Barnes (63 Vt. 456), 1522.
Cory v. Cory (1 Ves. Sr. 19), 87.
Cosgrove v. Bennett (32 Minn. 371), 1259, 1314, 1349, 1350, 1352.
Costigan v. Hawkins (22 Wis. 74), 836, 912, 1303.
Costigan v. Mohawk R. R. Co. (2 Denio, 609), 1106.
Cothay v. Tute (3 Camp. 129), 1183.
Cothran v. Ellis (125 Ill. 496), 1031, 1039.
Cotten v. McKenzie (57 Miss. 418), 1004.
Cotten v. Willoughby (83 N. C. 75), 202.
Cottrell v. Bank (89 Ga. 508), 569.
Cottrell v. Carter (173 Mass. 155), 599.
Cottrell v. Merchants' Bank (89 Ga. 508), 603.
Cottril v. Krum (100 Mo. 397), 881, 1841.
Coty v. Barnes (20 Vt. 78), 963.
Cotzhausen v. Simon (47 Wis. 103), 875.
Council Bluffs Iron Works v. Cuppey (41 Iowa, 104), 1187, 1189.
Counselman v. Reichart (103 Iowa, 430), 1031.
Court v. Snyder (2 Ind. App. 440), 1311, 1316, 1319.
Courtney v. Boswell (65 Mo. 196), 1817.
Courtright v. Leonard (11 Iowa, 32), 714.
Couse v. Tregent (11 Mich. 65), 599.
Couston v. Chapman (L. R. 2 Sc. App. 250), 1370, 1377.
Coutourier v. Hastie (5 H. L. 673), 199.
Covanhovan v. Hart (21 Pa. St. 495), 955.
Covell v. Hitchcock (23 Wend. 611), 1559, 1576, 1579.
Cover v. Smith (82 Md. 586), 1031, 1032.
Covill v. Hill (4 Denio, 323), 154, 156.
Cowan v. Dodd (3 Coldw. 278), 834.
Cowan v. Manufacturing Co. (92 Tenn. 376), 49.
Cowan v. Milbourn (L. R. 2 Exch. 230), 1010.
Cowan v. Singer Mfg. Co. (92 Tenn. 376), 569, 599.
Cowasjee v. Thompson (5 Moore, P. C. 165), 1497.
Cowdry v. Vandenburgh (101 U. S. 572), 162.
Cowles v. Whitman (10 Conn. 121), 1727.
Cowley v. Smyth (46 N. J. L. 380), 875, 877, 878.
Cowper v. Andrews (Hobart, 40), 213.
Cox v. Gerkin (38 Ill. App. 340), 1843.
Cox v. Highley (100 Pa. St. 249), 875.
Cox v. Long (69 N. C. 7), 1079, 1395.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1859.

Cox v. Prentice (3 Maule & Sel. 344), 274.
Cox Shoe Co. v. Adams (105 Iowa, 402), 895, 896, 905, 924.
Coxe v. Heisley (19 Pa. St. 243), 1264.
Coyle v. Baum (3 Okla. 695), 1344, 1822, 1826.
Crabtree v. Kile (21 Ill. 180), 816, 1393, 1805.
Crabtree v. Messersmith (19 Iowa, 179), 1089, 1090.
Craddock v. Dwight (85 Mich. 587), 1426.
Craft v. McConoughy (79 Ill. 346), 208.
Craft v. Parker (96 Mich. 245), 1356, 1357.
Cragin v. Coe (29 Conn. 51), 599.
Craig v. Godfroy (1 Cal. 415), 461.
Craig v. Harper (3 Cush. 158), 244.
Craig v. Miller (22 U. C. C. P. 348), 1225.
Craig v. Van Bebber (100 Mo. 584), 96, 109.
Cramer v. Reford (17 N. J. Eq. 367), 973.
Crampton v. Marble Co. (60 Vt. 291), 1786.
Crane v. Elder (48 Kan. 259), 937.
Crane v. Roberts (5 Me. 419), 660.
Crane v. Wilson (105 Mich. 554), 1138.
Crane Boot & Shoe Co. v. Trentman (34 Fed. R. 620), 918.
Crane Co. v. Columbus Constr. Co. (46 U. S. App. 52), 1817.
Crane Elevator Co. v. Clark (53 U. S. App. 257), 668.
Cranson v. Goss (107 Mass. 439), 1054.
Crapo v. Kelly (16 Wall. 610), 649.
Crapo v. Seybold (36 Mich. 444), 711.
Crater v. Binninger (33 N. J. L. 513), 1843.
Craven v. Ryder (6 Taunt. 433), 774, 1497.
Craver v. Hornburg (26 Kan. 94), 1344.
Cravins v. Gant (4 T. B. Mon. 126), 932.
Crawford v. Davis (99 Pa. St. 576), 960, 988.
Crawford v. Feder (34 Fla. 397), 138.
Crawford v. Forristall (58 N. H. 114), 981, 986.
Crawford v. Kirksey (55 Ala. 282), 955, 960.
Crawford v. Scovell (94 Pa. St. 48), 74, 77.
Crawford v. Spencer (92 Mo. 498), 203, 1031, 1032, 1039.
Crawford v. Whittaker (42 W. Va. 430), 1448.
Crawshay v. Eades (1 B. & C. 181), 1577, 1602.
Crawshay v. Thompson (4 M. & Gr. 357), 876.
Cream City Glass Co. v. Friedlander (84 Wis. 53), 1378, 1387.
Creekmore v. Baxter (121 N. C. 31), 72.
Creighton v. Comstock (27 Ohio St. 548), 1168.
Crenshaw v. Slye (52 Md. 140), 1244.
Crestwell Ranch Co. v. Martindale (63 Fed. R. 84), 1149.
Creveling v. Wood (95 Pa. St. 152), 54.
Crist v. Kleber (79 Pa. St. 290), 580, 588.
Crittenden v. Posey (38 Tenn. 311), 1794.
Crittenden v. Schermerhorn (39 Mich. 661), 184.
Crites v. Wilkinson (65 Cal. 559), 144.
Crocker v. Gullifer (44 Me. 491), 678, 679.
Crockett v. Scribner (64 Me. 447), 311.
Crofoot v. Bennett (2 N. Y. 258), 496, 497, 499, 516, 519, 524, 527, 703.
Croly v. Pollard (71 Mich. 612), 1309.
Crommelin v. N. Y. & H. R. Co. (4 Keyes, 90), 1475.
Crompton v. Beach (62 Conn. 25), 619.
Crompton v. Pratt (105 Mass. 255), 588, 590.
Crommell v. Wilkinson (18 Ind. 365), 1138.

References are to sections: Vol. I, §§ 1-797; Vol. II. §§ 798-1850.

Croninger v. Paige (48 Wis. 229), 816.
Cronk v. Cole (10 Ind. 485), 937.
Croockewit v. Fletcher (1 H. & N. 893), 861.
Crook v. Cowan (64 N. C. 743), 242, 740.
Crooks v. Moore (1 Sandf. 297), 1640.
Crookshank v. Burrell (18 Johns. 58), 305, 307.
Croom v. Shaw, (1 Fla. 211), 1281.
Crosby v. Baker (6 Allen. 295), 636.
Crosby v. Del. and Hud. Canal Co. (119 N. Y. 334), 35, 755.
Crosby Hardwood Co. v. Trester (90 Wis. 412), 337, 419.
Crosby v. Hill (39 Ohio St. 100), 1447, 1451.
Crosland v. Hall (33 N. J. Eq. 111), 937.
Cross v. Eglin (2 B. & Ad. 106), 1168.
Cross v. Gardner (1 Show. 68), 931, 1795.
Cross v. Huntley (13 Wend. 385), 834.
Cross v. O'Donnell (44 N. Y. 661), 362, 365, 393, 742, 1612.
Cross v. Peters (1 Greenl. 378), 902, 937.
Crossen v. Murphy (31 Oreg. 114), 914, 915, 919.
Crossley v. Maycock (L. R. 18 Eq. 180), 236.
Crossman v. Johnson (63 Vt. 333), 1227, 1248, 1249.
Crossman v. Universal Rubber Co. (127 N. Y. 34), 1411.
Crouch v. Carrier (16 Conn. 505), 960.
Crouch v. Hall (15 Ill. 263), 1043.
Crow v. Boyd (17 Ala. 51), 17.
Crowl v. Goodenberger (112 Mich. 683), 1161.
Crown Vinegar Co. v. Wehrs (59 Mo. App. 493), 1694.
Croy v. Busenbark (72 Ind. 48), 451.
Croyle v. Moses (90 Pa. St. 250), 868, 932, 935.
Cruess v. Fessler (39 Cal. 336), 937.
Cruikshank v. Cogswell (26 Ill. 366), 963.
Cruise v. Christopher (5 Dana, 181), 90.
Crumlish v. Central Improvement Co. (38 W. Va. 390), 1467.
Crummey v. Raudenbusch (55 Minn. 426), 1474, 1500, 1502, 1518, 1519, 1520.
Crymble v. Mulvaney (21 Colo. 203), 964.
Cuff v. Penn (1 Maule & Sel. 21), 1151,
Culin v. Glass Works (108 Pa. St. 220), 1743.
Culin v. Woodbury Glass Works (108 Pa. St. 220), 1743.
Cullen v. Bimm (37 Ohio St. 236), 1340.
Cullom v. Wagstaff (48 Pa. St. 300), 1130.
Cuming v. Brown (9 East, 506), 1564.
Cummings v. Arnold (3 Metc. 486), 474, 804, 806, 1151.
Cummings v. Cass (52 N. J. L. 77), 875.
Cummings v. Gilman (90 Me. 524), 485, 981.
Cummings v. Henry (10 Ind. 109), 87.
Cummings v. Roebuck (Holt, 172), 468.
Cundy v. Lindsay (3 App. Cas. 459), 149, 154, 156, 269.
Cunliffe v. Harrison (6 Ex. 903), 746, 1158, 1160.
Cunningham v. Ashbrook (20 Mo. 553), 496, 502, 519, 524, 529.
Cunningham v. Brown (44 Wis. 72), 210.
Cunningham v. Cureton (96 Ga. 489), 650.
Cunningham v. Hall (4 Allen, 268), 1350.
Cunningham v. Nat. Bank (71 Ga. 400), 1039.
Cunningham v. Trevitt (82 Me. 145), 603.
Cunningham v. Williams (43 Mo. App. 629), 428, 449.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Cunningham Iron Co. v. Warren Mfg. Co. (80 Fed. R. 878), 1103.
Curiven v. Quill (165 Mass. 373), 1350.
Curme v. Rauh (100 Ind. 247), 148.
Currier v. Knapp (117 Mass. 324), 573, 588, 590, 693.
Curry v. St. John Plow Co. (55 Ill. App. 82), 121.
Curtin v. Isaacsen (36 W. Va. 391), 1474, 1485.
Curtin v. Somerset (140 Pa. St. 70), 878.
Curtis v. Blair (26 Miss. 309), 244.
Curtis v. Groat (6 Johns. 168), 639.
Curtis v. Pugh (10 Q. B. 111), 369.
Curtis v. Leavitt (15 N. Y. 1), 1048.
Curtis Mfg. Co. v. Williams (48 Ark. 325), 1344.
Cusack v. Robinson (1 B. & S. 299), 393, 1181, 1496.
Cushing v. Breed (14 Allen, 376), 708, 709, 964, 1302.
Cushman v. Holyoke (34 Me. 289), 527, 529.
Cushman v. Jewell (7 Hun, 525), 628.
Cushman v. Thayer Mfg. Co. (76 N. Y. 365), 1724, 1727.
Cutler v. Bower (11 Ad. & El. 973), 834.
Cutler v. Gilbreth (53 Me. 176), 1809.
Cutler v. Pope (13 Me. 377), 337, 341.
Cutter v. Powell (2 Smith Lead. Cas. 1212), 1089.
Cutting v. Grand Trunk Ry. Co. (13 Allen, 381), 1690.
Cutting v. Jackson (56 N. H. 253), 964.
Cutting Packing Co. v. Packers' Exchange (86 Cal. 574), 200.
Cutts v. Guild (57 N. Y. 229), 274.
Daborich v. Emeric (12 Cal. 161), 1794.
Dady v. Condit (163 Ill. 511), 879.
Daggett v. Johnson (49 Vt. 345), 667.
Dake Engine Mfg. Co. v. Hurly (99 Mich. 16), 1235.
Dakota Stock Co. v. Price (22 Neb. 96), 1124, 1412.
Dale's Case (Cro. Eliz. 44), 931, 1795.
Dalrymple v. Scott (19 Ont. App. 477), 1089.
Dalton v. Bentley (15 Ill. 420), 839, 1850.
Dalton v. Gib (5 Bing. N. Cas. 198), 128, 130.
Dalton v. Thurston (15 R. I. 418), 906.
Daly v. Kimball Co. (67 Iowa, 132), 812.
Dalzell v. Fahys Watch Co. (138 N. Y. 285), 1161.
Dambmann v. Rittler (70 Md. 380), 264.
Dame v. Dame (38 N. H. 429), 333.
Damm v. Mason (98 Mich. 237), 578.
Damon v. Osborn (1 Pick. 476), 401, 702, 703.
Dana v. Binney (7 Vt. 493), 1424.
Dana v. Boyd (2 J. J. Marsh. 588), 1392.
Dana v. Fiedler (12 N. Y. 40), 1693, 1736.
Danbury v. Robinson (1 McCarter, 213), 977.
Dando v. Foulds (105 Pa. St. 74), 580, 658.
Danforth v. Cushing (77 Me. 182), 884.
Danforth v. Walker (37 Vt. 239), 1091, 1702.
Daniel v. Hannah (106 Ga. 91), 210, 211.
Daniels v. Bailey (43 Wis. 198), 336.
Daniels v. Hollenbeck (19 Wend. 408), 1466.
Daniels v. Nelson (41 Vt. 161), 167.
Daniels v. Newton (114 Mass. 530), 1089, 1090.
Danube & Black Sea Co. v. Xenos (13 Com. B. 825), 1089.
D'Aquila v. Lambert (Ambler, 399), 1526, 1528, 1530.
Darby v. Boucher (1 Salk. 279), 132.
Darling v. Wilson (60 N. H. 59), 636.
Darling v. Younker (37 Ohio St. 487), 1463.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Darnell v. Rowland (30 Ind. 342), 65.
Darst v. Brockway (11 Ohio St. 462), 838, 1849.
Dater v. Earl (3 Gray, 482), 1013.
Dauphiny v. Red Poll Creamery Co. (123 Cal. 548), 358, 1387.
David v. Insurance Co. (83 N. Y. 265), 451.
David v. Park (103 Mass. 501), 881.
Davidson v. Burke (143 Ill. 139), 955.
Davidson v. Crosby (49 Neb. 60), 879.
Davis v. Bigler (62 Pa. St. 242), 169.
Davis v. Bradley (28 Vt. 118), 51, 752, 1194, 1327.
Davis v. Bronson (6 Iowa, 410), 1027.
Davis v. Bronson (2 N. D. 300), 1091, 1699.
Davis v. Budd (60 Iowa, 144), 702.
Davis v. Burnett (4 Jones, 71), 1281.
Davis v. Caldwell (12 Cush. 512), 128, 130.
Davis v. Cook (14 Nev. 265), 148.
Davis v. Davis (119 Ind. 511), 1031.
Davis v. Dudley (70 Me. 236), 95.
Davis v. Emery (11 N. H. 230), 628.
Davis v. Fish (1 G. Greene, 408), 1741.
Davis v. Giddings (30 Neb. 209), 541.
Davis v. Grand Rapids School Furniture Co. (41 W. Va. 717), 1089, 1090, 1743.
Davis v. Hill (3 N. H. 382), 520, 714.
Davis v. Iverson (5 S. Dak. 295), 823, 1251, 1277.
Davis v. Koenig (165 Pa. St. 347), 1183.
Davis v. Mitchell (34 Cal. 81), 947.
Davis v. Moore (13 Me. 424), 401.
Davis v. McFarland (37 Cal. 634), 342, 964, 1199.
Davis v. Osgood (69 N. H. 427), 650.
Davis v. Randall (115 Mass. 547), ——.
Davis v. Reilly (1 Q. B. 1), 1428.
Davis v. Robinson (67 Iowa, 355), 1813.
Davis v. Rowell (2 Pick. 64), 327, 461.
Davis v. Russell (52 Cal. 611), 166, 1507.
Davis v. Schwartz (155 U. S. 631), 952.
Davis v. Shields (26 Wend. 341), 439, 456.
Davis v. Sittig (65 Tex. 497), 947.
Davis v. Stewart (8 Fed. R. 803), 906.
Davis v. Sweeney (75 Iowa, 45), 1340, 1344.
Davis v. Turner (3 Gratt. 423), 960.
Davis v. Waterman (10 Vt. 526), 1444.
Davis v. Zimmerman (40 Mich. 24), 966.
Davis' Sons v. Robinson (67 Iowa, 355), 823.
Davis Sulphur Ore Co. v. Atlanta Guano Co. (109 Ga. 67), 1629, 1634, 1650.
Davison v. Collison ("Times," March 14, 1885), 1561.
Davison v. Davis (125 U. S. 90), 555.
Davison v. Von Lingen (113 U. S. 40), 1138, 1145.
Dawe v. Morris (149 Mass. 188), 870, 874, 885, 937.
Dawes v. Peck (8 T. R. 330), 393, 740, 787, 1181, 1496.
Dawson v. Collis (10 C. B. 523), 1805.
Dawson v. Dawson (12 Iowa, 513), 186.
Dawson v. Flash (97 Ala. 530), 955.
Dawson v. Pennamen (65 Ga. 698), 820.
Day v. Bassett (102 Mass. 445), 573, 588, 590. 693.
Day v. Cooley (118 Mass. 524), 973.
Day v. Cross (59 Tex. 595), 1167.
Day v. Gravel (72 Minn. 159), 499.
Day v. Jeffords (102 Ga. 714), 1106.
Day v. Mapes-Reeves Construction Co. (174 Mass. 412), 1337, 1391.
Day v. McAllister (15 Gray, 433), 1057.
Day v. Pool (52 N. Y. 416), 1222, 1272, 1392, 1394. 1395, 1805.
Day v. Raguet (14 Minn. 273), 1320, 1321.
Day Land & Cattle Co. v. State (68 Tex. 526), 191.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Day-light Burner Co. v. Odlin (51 N. H. 56), 175.
Dayton v. Hooglung (39 Ohio St. 671), 1287, 1320, 1335, 1393, 1395, 1844.
Dayton v. Monroe (47 Mich. 193), 915.
Dean v. Connelly (6 Barr, 239), 953.
Dean v. Mason (4 Conn. 428), 1254, 1319.
Dean v. Morey (33 Iowa, 120), 1272.
Dean v. Nichols (95 Iowa, 89), 1385.
Dean v. Yates (22 Ohio St. 388), 149, 269, 887, 910.
Dearborn v. Raysor (132 Pa. St. 231), 580, 600.
Dearborn v. Turner (16 Me. 17), 677, 678.
Deason v. Boyd (1 Dana, 45), 121.
Deatherage v. Henderson (43 Kan. 684), 1455.
Decan v. Shipper (35 Pa. St. 239), 149.
Decell v. Lewenthal (57 Mass. 331), 123, 127, 131, 132.
Decker v. Fredericks (47 N. J. L. 469), 1281.
De Cordova v. Smith (9 Tex. 129), 449.
Dederick v. Wolf (68 Miss. 500), 568, 569, 619, 623.
Dedman v. Earle (52 Ark. 164), 643.
Deel v. Berry (21 Tex. 463), 1442.
Deere v. Lewis (51 Ill. 254), 1741, 1755.
Deere v. Needles (65 Iowa, 101), 965.
Deering v. Chapman (22 Me. 488), 1004.
Deering v. Thom (29 Minn. 120), 1286.
Defenbaugh v. Weaver (87 Ill. 132), 1161.
Defreeze v. Trumper (1 Johns. 274), 1302.
Dehority v. Paxson (97 Ind. 253), 382.
Deitz v. Sutcliffe (80 Ky. 650), 901.
Delamater v. Chappell (48 Md. 244), 671, 1387.
Deland v. Vanstone (26 Mo. App. 297), 336.
Delano v. Blake (11 Wend. 85), 121.
Delano v. Case (121 Ill. 247), 878.
De La Vergne, etc. Co. v. New Orleans, etc. R. Co. (51 La. Ann. 1733), 1374.
Delavina v. Hill (65 N. H. 94), 1013, 1022.
Delaware, The (14 Wall. 579), 1254.
Dellone v. Hull (47 Md. 112), 912.
De Mattos v. Gibson (4 De G. & J. 276), 1719,
Demens v. Le Moyne (26 Fla. 323), 1375.
Demeritt v. Miles (22 N. H. 523), 947.
Deming v. Chase (48 Vt. 382), 1281, 1294.
Deming v. Darling (148 Mass. 504), 893, 936, 937, 1242.
Deming v. Foster (42 N. H. 165), 1259, 1314, 1315, 1349.
Dempsey v. Gardner (127 Mass. 381), 964, 1193.
Dennis v. Alexander (3 Pa. St. 50), 499, 516, 527.
Dennis v. Jones (44 N. J. Eq. 513), 909.
Dennis v. Stoughton (55 Vt. 371), 1129.
Denny v. Williams (5 Allen, 1), 373.
Densmore v. Turner (14 Neb. 392), 960.
Denver, etc. Ry. Co. v. Atchison, etc. Ry. Co. (15 Fed. R.), 208.
Derby v. Johnson (21 Vt. 17), 1091.
Derby v. Weyrich (8 Neb. 174), 950.
Derbyshire's Estate, In re (81 Pa. St. 18), 755.
Dermott v. Jones (2 Wall. 1), 1105.
Derosia v. Winona, etc. R. Co. (18 Minn. 133), 1132.
Derrick v. Pierce (94 Ga. 466), 603.
Derry v. Peek (14 App. Cas. 337), 856, 863, 876, 878, 932.
De St. Germain v. Wind (3 Wash. Terr. 189), 569.
Desany v. Thorp (70 Vt. 31), 599, 603, 636.
Des Forges v. Pugh (93 N. C. 31), 892.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Desha v. Pope (6 Ala. 690), 51, 752.
Desilver, Estate of (5 Rawle, 110), 72, 77.
Detroit Chamber of Commerce v. Goodman (110 Mich. 498), 137.
Detroit Heating Co. v. Stevens (16 Utah, 177), 1387.
Devane v. Fennell (2 Ired. 36), 205, 520, 523.
Devaux v. Conolly (8 C. B. 640), 839, 1850.
Devine v. Edwards (101 Ill. 138), 733, 741, 839, 1184.
Devine v. Edwards (87 Ill. 177), 1850.
Devlin v. Mayor of N. Y. (63 N. Y. 8), 1762.
Devlin v. O'Neill (6 Daly, 305), 601.
Devlin v. Smith (89 N. Y. 470), 878.
Dewes Brewery Co. v. Merritt (82 Mich. 198), 564, 588, 597, 599.
Dewey v. Erie Borough (14 Pa. St. 211), 661, 662, 1384.
Dewey v. Thrall (13 Vt. 284), 965.
Dewing v. Perdicaries (96 U. S. 193), 1024.
De Witt v. Berry (134 U. S. 306), 1240, 1254, 1259, 1339.
De Witt v. Van Sickle (29 N. J. Eq. 209), 953.
Dewitt v. Walton (9 N. Y. 571), 451.
De Wolf v. Gardner (12 Cush. 19), 752, 788.
Dexter v. Hall (15 Wall. 9), 72, 77.
Dexter v. Norton (47 N. Y. 62), 199, 513, 1100, 1103.
Dexter v. Parkins (22 Ill. 143), 960.
Deyo v. Hammond (102 Mich. 122), 211, 1235.
Deyoe v. Jamison (33 Mich. 94), 606, 628.
Dial v. Crane (10 Tex. 444), 804.
Dias v. Chickering (64 Md. 348), 165.
Dibblee v. Sheldon (10 Blatch. 178), 908, 909.
Dickens v. Williams (2 B. Mon. 374), 1242.
Dickenson v. Gapp (8 Bing. 50), 1276.
Dickey v. Waldo (97 Mich. 255), 199, 200.
Dickinson v. Dickinson (29 Conn. 600), 328.
Dickinson v. Dodds (2 Ch. Div. 463), 252, 253, 257.
Dickinson v. Follett (1 M. & Rob. 299), 1270.
Dickinson v. Gay (7 Allen, 29), 1320, 1326, 1328.
Dickinson v. Hall (14 Pick. 217), 834.
Dickinson v. King (28 Vt. 378), 1424.
Dickson v. Jordan (11 Ired. L. 166), 1311, 1314.
Dickson v. Thomas (97 Pa. St. 278), 1031.
Dickson v. Zizinia (10 C. B. 602), 1259.
Diebold Safe Co. v. Holt (4 Okl. 479), 1183.
Diebold Safe & Lock Co. v. Huston (55 Kan. 104), 1254, 1337, 1349.
Diehl v. McCormick (143 Pa. St. 584), 492.
Diem v. Koblitz (49 Ohio St. 41), 1121, 1472, 1539, 1611, 1626.
Dierson v. Petersmeyer (—— Iowa, ——), 325, 358, 400.
Dietz v. Sutcliffe (80 Ky. 650), 1411.
Diggs v. Denny (86 Md. 116), 906.
Dignan v. Spurr (3 Wash. 309), 1389.
Dike v. Reitlinger (23 Hun, 241), 652, 1223.
Dilenbeck v. Rehse (105 Iowa, 749), 1459.
Dill v. Bowen (54 Ind. 204), 109.
Dill v. Mumford (19 Ind. App. 609), 1633.
Dill v. O'Ferrell (45 Ind. 268), 916.
Dillman v. Nadlehoffer (119 Ill. 567), 880.
Dillon v. Anderson (43 N. Y. 231), 1702.
Dillon v. Bowles (77 Mo. 603), 130.
Dilworth v. Bradner (85 Pa. St. 238), 875.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Dingle v. Hare (7 C. B. 245), 1281.
Dingley v. Oler (11 Fed. R. 372), 1090.
Dingley v. Oler (117 U. S. 490), 1087, 1090, 1130, 1134.
Dinker v. Potts (90 Ga. 103), 892, 924.
Dinney v. Johnson (8 N. Dak. 153), 358.
Disborough v. Neilson (3 Johns. Cas. 81), 264, 1170.
Disbrow v. Secor (58 Conn. 35), 187.
Dist. of Columbia v. Clephane (110 U. S. 212), 1349.
Ditman v. Cottrell (125 Pa. St. 606), 580.
Dittmar v. Norman (118 Mass. 319), 46.
Diversy v. Kellogg (44 Ill. 114), 175, 739, 1372.
Divine v. McCormick (50 Barb. 116), 1356, 1357.
Dixon, Ex parte (4 Ch. Div. 133), 1451.
Dixon v. Baldwin (5 East, 175), 1559, 1577.
Dixon v. Blondin (58 Vt. 689), 565, 649.
Dixon v. Fletcher (3 M. & W. 145), 746, 1158, 1161.
Dixon v. Hill (5 Mich. 404), 924, 952.
Dixon v. Yates (5 B. & Ad. 313), 281, 484, 493, 1119, 1129, 1485, 1499, 1502, 1602.
Doane v. Dunham (65 Ill. 512), 1140, 1375, 1393, 1402.
Doane v. Lockwood (115 Ill. 490), 148, 915.
Dobell v. Hutchinson (3 Ad. & E. 355), 426, 428.
Dodd v. Bowles (3 Wash. Terr. 383), 588, 597.
Dodd v. St. John (22 Oreg. 250), 139.
Dodge v. Emerson (131 Mass. 467), 1424.
Dodge v. Meyer (61 Cal. 405), 1194.
Dodsley v. Varley (12 Ad. & El. 632), 1471.
Dodson v. Harris (10 Ala. 566), 1058.
Dodson v. Wentworth (4 Man. & G. 1080), 1577.
Dodsworth v. Hercules Iron Works (31 U. S. App. 292), 1387.
Doe v. Knight (5 B. & C. 71), 259.
Doe v. Oliver (2 Sm. L. C. 803), 845.
Dolan v. Green (110 Mass. 322), 739.
Dolan v. Van Demark (35 Kan. 304), 963.
Dole v. Olmstead (36 Ill. 150), 642.
Dole v. Stimpson (21 Pick. 384), 386.
Domestic Sewing Mach. Co. v. Anderson (23 Minn. 57), 547.
Donaldson v. Farwell (93 U. S. 631), 901, 924.
Donaldson v. Rouzan (8 Mart., N. S., 163), 8.
Donath v. Broomhead (7 Pa. St. 301), 1586.
Donnell v. Hearn (17 N. Y. Wkly. Dig. 463), 305.
Donohue v. Woodbury (6 Cush. 148), 1420.
Donovan v. Daiber (— Mich. —), 1031, 1032.
Donovan v. Gathe (3 Colo. App. 151), 964.
Donovan v. Willson (26 Barb. 138), 305.
Doran v. Eaton (40 Minn. 35), 1843.
Doremus v. Howard (23 N. J. L. 390), 1674.
Dorman v. Soto (— Cal. —), 964.
Dorman v. Weakley (— Tenn. —), 906.
Dorntee Casket Co. v. Gunnison (69 N. H. 297), 650.
Dorrance v. Dean (106 N. Y. 203), 169.
Doty v. Knox County Bank (16 Ohio St. 133), 1004.
Doty v. Wilder (15 Ill. 407), 461.
Doubleday v. Kress (50 N. Y. 410), 1453, 1459.
Doucet v. Richardson (67 N. H. 186), 964.
Dougherty v. Cooper (77 Mo. 528), 952.
Doughty v. Manhattan Brass Co. (101 N. Y. 644), 428.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Douglas v. People's Bank (86 Ky. 176), 788.
Douglas v. Shumway (13 Gray, 498), 336, 1492.
Douglass v. Moses (89 Iowa, 40), 1248, 1817, 1818.
Douglass v. Spears (2 N. & McC. 207), 425, 449.
Douglass Axe Mfg. Co. v. Gardner (10 Cush. 88), 1807, 1808.
Dounce v. Dow (57 N. Y. 16), 1222, 1237, 1314, 1395.
Dow v. Sanborn (3 Allen, 181), 901.
Dow v. Worthen (37 Vt. 108), 415.
Dowdell v. Empire Furn. Co. (84 Ala. 316), 620.
Dowling v. Betjeman (2 Johns. & Hem. 544), 1723.
Dowling v. Lawrence (58 Wis. 282), 869, 935.
Dowling v. McKenney (124 Mass. 478), 16.
Downer v. Thompson (6 Hill, 208), 1159.
Downer v. Thompson (2 Hill, 137), 746.
Downing v. Dearborn (77 Me. 457), 1344.
Downs v. Marsh (29 Conn. 409), 746, 1161.
Downs v. Ross (23 Wend. 270), 293, 305, 307, 324.
Dows v. Greene (24 N. Y. 638), 166.
Dows v. Kidder (84 N. Y. 121), 543, 554, 890.
Dows v. Milwaukee Bank (91 U. S. 618), 782.
Dows v. Nat. Exch. Bank (91 U. S. 618), 774, 779, 792.
Dozier v. Matson (94 Mo. 328), 955.
Drain v. Doggett (41 Iowa, 682), 1455.
Drake v. Seaman (97 N. Y. 230), 426.
Drake v. Vorse (52 Iowa, 417), 263.
Drake v. Wells (11 Allen, 141), 336, 626, 1191.
Draper v. Jones (11 Barb. 263), 478.
Draper v. Rice (56 Iowa, 114), 1461.
Dressel v. Jordan (104 Mass. 407), 425, 450.
Dressel v. Lonsdale (46 Ill. App. 454), 138.
Dresser v. Ainsworth (9 Barb. 619), 1304, 1797.
Dresser Mfg. Co. v. Waterston (3 Met. 9), 549.
Drew v. Beall (62 Ill. 167), 1843.
Drew v. Edmunds (60 Vt. 401), 1235, 1237, 1272, 1334.
Drew v. Pedlar (87 Cal. 443), 629.
Drews v. Logging Co. (53 Minn. 199), 1265.
Driggs v. Norwood (50 Ark. 42), 957.
Drummond v. Van Ingen (12 App. Cas. 284), 1329, 1331, 1340, 1342, 1344, 1346, 1377.
Drurey v. Hervey (126 Mass. 519), 626, 627.
Drury v. Defontaine (1 Taunt. 131), 1045, 1052.
Drury v. Wilson (38 N. Y. S. 538), 964.
Drury v. Young (58 Md. 546), 428, 451.
Dubé v. Beaudry (150 Mass. 448), 118.
Dubois v. Spinks (114 Cal. 289), 964.
Dubose v. Wheddon (4 McCord. 221), 124.
Duchman v. Hagerty (6 Watts, 65), 1004.
Dudley v. Abner (52 Ala. 572), 599.
Dudley v. Mallery (4 Ga. 52), 1719.
Duff v. Budd (3 Brod. & B. 177), 887.
Duff v. Williams (85 Pa. St. 490), 875.
Duffield v. Scott (3 D. & E. 210), 1798.
Dufour v. Camfranc (11 Mart. 610, S.
Duffus v. Furnace Co. (15 Misc. 169), 603.
Dugan v. Anderson (36 Md. 567), 1089, 1090.
Dugan v. Gittings (3 Gill, 138), 955.
Dugan v. Nichols (125 Mass. 43), 961.
Duggan v. Pacific Boom Co. (6 Wash. 593), 1425.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Duke v. Shackleford (56 Miss. 552), 629.
Duke of Somerset v. Cookson (3 P. Wms. 390), 1719.
Dulaney v. Green (4 Harr. 285), 82.
Dulaney v. Rogers (64 Mo. 201), 875.
Dunnage v. White (1 Wils. Ch. 67), 73.
Dunnahoe v. Williams (24 Ark. 264), 178.
Dunbar v. Johnson (108 Mass. 519), 1004.
Dunbar v. Locke (62 N. H. 442), 1028.
Dunbar v. Marden (13 N. H. 311), 834.
Dunbar v. Rawles (28 Ind. 225), 599.
Duncan v. Cashin (L. R. 10 C. P. 554), 135.
Duncan v. Topham (8 Com. Bench, 225), 251, 1134.
Duncomb v. Tickridge (Aleyn, 94), 126.
Duncuft v. Albrecht (12 Sim. 189), 329.
Dunkart v. Rineheart (89 N. C. 354), 702.
Dunkirk Colliery Co. v. Lever (9 Ch. D. 20), 1770.
Dunks v. Fuller (32 Mich. 242), 909.
Dunlap v. Berry (5 Ill. 327), 714.
Dunlap v. Bournonville (26 Pa. St. 72), 966.
Dunlap v. Gleason (16 Mich. 158), 599.
Dunlap v. Hawkins (59 N. Y. 342), 972.
Dunlop v. Higgins (1 H. L. Cas. 387), 244, 245, 247, 251, 252, 258.
Dunlop v. Lambert (6 C. & F. 600), 393, 733, 741, 743, 744, 787, 1181, 1496.
Dunman v. Strother (1 Tex. 89), 1442.
Dunmore v. Alexander (9 Shaw & Dunlop, 190), 262.
Dunn v. Bell (85 Tenn. 581), 1031.
Dunn v. State (82 Ga. 27), 1029.
Dunn v. Swan (115 Mich. 409), 200.
Dunton v. Brown (31 Mich. 182), 107.
Duplanty v. Stokes (103 Mich. 630), 1374.
Duplex Safety Boiler Co. v. Garden (101 N. Y. 387), 668.
Durfee v. Jones (11 R. I. 588), 273, 274.
Durgy Cement Co. v. O'Brien (123 Mass. 12), 1537, 1539, 1571.
Durgin v. Dyer (68 Me. 143), 1045, 1050.
Durkee v. Moses (67 N. H. 115), 1028.
Durkee v. Vermont Cent. R. R. Co. (29 Vt. 127), 247.
Durr v. Hervey (44 Ark. 301), 1507.
Durr v. Replogle (167 Pa. St. 347), 620.
Durrell v. Evans (6 H. & N. 660), 460.
Durrell v. Evans (1 H. & C. 174), 451, 460, 462.
Durst v. Burton (47 N. Y. 167), 1693.
Dushane v. Benedict (120 U. S. 630), 1345.
Dustan v. McAndrew (44 N. Y. 72), 1618, 1643, 1677, 1678, 1682, 1693.
Dustin v. Cowdry (23 Vt. 6 '6), 907.
Dutcher v. Beckwith (45 Ill. 460), 1445.
Dutcher v. Wright (94 U. S. 553), 1540.
Dutchess Co. v. Harding (49 N. Y. 321), 1392, 1397.
Dutton v. Solomonson (3 B. & P. 582), 736, 740, 787, 1181.
Duval v. Mowry (6 R. I. 479), 915, 919.
Dwiggins v. Clark (94 Ind. 49), 1633.
Dwight v. Eckert (117 Pa. St. 490), 1127, 1130.
Dwight v. Elmira, etc. R. Co. (132 N. Y. 199), 1828.
Dwinel v. Howard (30 Me. 258), 1084, 1148.
Dyckman v. Valiente (43 Barb. 131), 755.
Dyer v. Great Northern Ry. Co. (51 Minn. 345), 736.
Dyer v. Homer (22 Pick. 253), 836, 947.
Dyer v. Taylor (50 Ark. 314), 953.
Dykers v. Townsend (24 N. Y. 57), 431.
Eadie v. Ashbaugh (44 Iowa, 519), 1288.
Eagan Co. v. Johnson (82 Ala. 233), 1395.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Eagle v. Eichelberger (6 Watts, 29), 960, 988.
Eagle Bank v. Smith (5 Conn. 71), 1422.
Eagle Iron Works v. Des Moines Suburban Ry. Co. (101 Iowa, 289), 1805, 1819, 1837.
Earl of Glengal v. Barnard (1 Keen, 769), 460.
Earle v. Coburn (130 Mass. 596), 1475.
Earle v. Peale (1 Salk. 386), 132.
Earle v. Reed (10 Metc. 387), 122, 123, 124.
Earley v. Garrett (9 B. & C. 928), 1311.
East Tenn. R. Co. v. Hunt (15 Lea, 261), 1475.
Eastern Granite Co. v. Heim (89 Iowa, 698), 1106.
Eastman v. Avery (23 Me. 248), 39.
Eaton v. Avery (83 N. Y. 31), 878, 895.
Eaton v. Cook (32 Vt. 58), 1532, 1562, 1563, 1604.
Eaton v. Davidson (46 Ohio St. 355), 924.
Eaton v. Eaton (37 N. J. L. 108), 72, 74, 77.
Eaton v. Kegan (114 Mass. 433), 1050.
Eaton v. Munroe (52 Me. 63), 636, 638.
Eaves v. Estes (10 Kan. 314), 647.
Eberle v. Mehrbach (55 N. Y. 682), 1052.
Eberstadt v. Jones (19 Tex. App. 480), 1046.
Echols v. New Orleans, etc. R. Co. (52 Miss. 610), 1131.
Echols v. Railroad Co. (52 Miss. 610), 1132.
Eckenrode v. Chemical Co. (55 Md. 51), 1089, 1092.
Eckert v. Schoch (155 Pa. St. 530), 242, 246.
Eckstein v. Downing (64 N. H. 248), 1718, 1727.
Eclipse Wind Mill Co. v. Thornton (46 Iowa, 181), 1451.
Edan v. Dudfield (1 Q. B. 302), 389, 1490.
Eddy v. Capron (4 R. I. 394), 1042.
Eddy v. Clement (38 Vt. 486), 1103.
Edelhoff v. Horner Mfg. Co. (86 Md. 595), 905.
Edelman v. Latshaw (180 Pa. St. 419), 899.
Eden v. Parkinson (2 Doug. 733), 1266.
Edgar v. Boies (11 Serg. & R. 445), 1440.
Edgar v. Breck (172 Mass. 581), 401, 1334, 1827.
Edgecombe v. Rodd (5 East, 294), 1466.
Edgerly v. Shaw (25 N. H. 512), 96, 121.
Edgerton v. Hodge (41 Vt. 676), 418.
Edgewood Distilling Co. v. Shannon (60 Ark. 133), 564.
Edgington v. Fitzmaurice (29 Ch. Div. 459), 876.
Edick v. Crim (10 Barb. 445), 1302.
Edison Gen'l Elec. Co. v. Walter (10 Wash. 14), 564.
Edmond v. Caldwell (15 Mo. 340), 1424.
Edmunds v. Merchants' Desp. Trans. Co. (135 Mass. 283), 149, 267, 269, 887.
Edmunds v. Mister (58 Miss. 765), 121.
Edrington v. Rogers (15 Tex. 188), 953.
Edson v. Hudson (83 Mich. 450), 906, 923, 924.
Edward Hines Lumber Co. v. Alley (43 U. S. App. 169), 1087, 1090.
Edwards' Appeal (105 Pa. St. 103), 580.
Edwards v. Brewer (2 Mees. & W. 375), 1577, 1604.
Edwards v. Dickson (66 Tex. 613), 960.
Edwards v. Dillon (147 Ill. 14), 1344, 1354.
Edwards v. Grand Trunk Ry. Co. (54 Me. 105), 311.
Edwards v. Grand Trunk Ry. Co. (48 Me. 379), 293, 311, 324.
Edwards v. Harben (2 T. R. 587), 960.
Edwards v. Marcy (2 Allen, 486), 1244.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Edwards v. Meadows (71 Ala. 42), 1193.
Edwards v. Railway Co. (54 Me. 105), 382, 386, 1665.
Edwards v. Randle (63 Ark. 318), 1042.
Edwards v. Sanborn (6 Mich. 348), 1790.
Egan v. Barclay Fibre Co. (61 Fed. R. 527), 1134.
Eggleston v. Wagner (46 Mich. 610), 228, 234, 437.
Eichelbarger v. McCauley (5 H. & J. 213), 307, 323.
Eicholtz v. Bannister (17 Com. B. 708), 838, 1301, 1793, 1849.
Eidson v. Hedger (38 Mo. App. 52), 603.
Eighmie v. Taylor (98 N. Y. 288), 1254, 1255.
Eiland v. Radford (7 Ala. 724), 688, 692.
Eisenberg v. Nichols (22 Wash. 70), 603.
Eland v. Karr (1 East, 375), 1438.
Elbinger Actien-Gesellschaft v. Armstrong (L. R. 9 Q. B. 473), 1766, 1770.
Eldridge v. Benson (7 Cush. 483), 48.
Electric Lighting Co. v. Rust (117 Ala. 680), 202.
Electric Service Co. v. Gill-Alexander Co. (125 Mo. 140), 1718.
Electro Dynamic Co. v. The Electron (74 Fed. R. 689), 1304.
Elerick v. Reid (54 Kan. 579), 937.
Elgee Cotton Cases, The (22 Wall. 180), 508, 509, 513, 514, 520, 531, 532.
Eliason v. Henshaw (4 Wheat. 225), 228, 229, 233, 239, 244, 249.
Elkins v. Kenyon (34 Wis. 93), 1235.
Elkins v. McKean (79 Pa. St. 493), 878.
Elkins v. Parkhurst (17 Vt. 105), 1050.
Ellen v. Topp (6 Exch. 424), 861, 1106.
Ellershaw v. Magniac (6 Ex. 570), 735, 774, 779, 784, 787.
Ellis v. Allen (80 Ala. 515), 144.
Ellis v. Andrews (56 N. Y. 83), 893, 936.
Ellis v. Bonner (80 Tex. 198), 761.
Ellis v. Denver, etc. Ry. Co. (7 Colo. App. 350), 318.
Ellis v. Gosney (7 J. J. Marsh. 109), 1794.
Ellis v. Hammond (57 Ga. 179), 1053.
Ellis v. Hilton (78 Mich. 150), 1826.
Ellis v. Holland (98 Ga. 154), 597.
Ellis v. Hunt (3 T. R. 464), 1577, 1601.
Ellis v. Mathews (19 Tex. 390), 64, 65.
Ellis v. Mortimer (1 Bos. & P. N. R. 257), 660.
Ellis v. Roche (73 Ill. 280), 746.
Ellis v. Thompson (3 Mees. & Wels. 445), 1129.
Elliot v. Hall (2 Idaho, 1142), 950.
Elliott v. Bradley (23 Vt. 217), 51.
Elliott v. Cox (48 Ga. 39), 51, 752.
Elliott v. Dean (Cab. & El. 283), 428.
Elliott v. Edwards (35 N. J. L. 265), 755.
Elliott v. Puget Sound, etc. Co. (22 Wash. 220), 1836.
Elliott v. Von Glehn (13 Q. B. 632), 861.
Ellithorpe Air Brake Co. v. Sire (41 Fed. R. 662), 1106.
Elmer v. Pennel (40 Me. 430), 834.
Elmore v. Fitzpatrick (56 Ala. 400), 636.
Elmore v. Kearney (23 La. Ann. 479), 749.
Elmore v. Kingscote (5 B. & C. 583), 438, 448.
Elmore v. Stone (1 Taunt. 457), 385, 386, 964.
Elphick v. Barnes (5 C. P. Div. 321), 658, 677.
Elston v. Jasper (45 Tex. 409), 69, 72.
Elwood v. May (24 Neb. 375), 955.
Elwood v. McDill (105 Iowa, 437), 1807.
Ely v. James (123 Mass. 36), 1424.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Ely v. Webster (102 Mass. 304), 1018.
Embrey v. Jemison (131 U. S. 336), 1039.
Emma Silver Mining Co. Lim. v. Emma Silver Min. Co. of N. Y. (7 Fed. R. 401), 910.
Emerson v. European, etc. Ry. Co. (67 Me. 387), 199, 200, 202.
Emerson v. McNamara (41 Me. 565), 908.
Emerson v. Steel Co. (100 Mich. 127), 1411.
Emerine v. O'Brien (36 Ohio St. 491), 1429.
Emery's Sons v. Irving Nat. Bank (25 Ohio St. 360), 779, 788, 790.
Emmerson v. Heelis (2 Taunt. 38), 460, 461.
Emonds v. Termehr (60 Iowa, 92), 954.
Empire State Type Foundry Co. v. Grant (114 N. Y. 40), 541, 546, 547, 549.
Empire State Phosphate Co. v. Heller (61 Fed. R. 280), 1130.
Ender v. Scott (11 Ill. 35), 1237.
Endsley v. Johns (120 Ill. 460), 875, 877.
Enger v. Dawley (62 Vt. 164), 1237, 1240.
England v. Adams (157 Mass. 449), 1411.
England v. Forbes (7 Houst. 301), 483, 485, 549, 892.
Englebert v. Troxell (40 Neb. 195), 109, 132.
Englehart v. Clanton (83 Ala. 336), 1245.
English v. Spokane Commission Co. (15 U. S. App. 218), 1265, 1298, 1340, 1393, 1395.
English v. Spokane Comm. Co. (48 Fed. R. 196), 1335, 1393, 1395.
English v. Spokane Comm. Co. (57 Fed. R. 451), 1393.
Engeman v. Taylor (46 W. Va. 669), 932.
Enlow v. Klein (79 Pa. St. 488), 32, 580, 588, 600.
Ennis v. Borner (40 C. C. A. 249), 868.
Ennis v. Buckeye Pub. Co. (44 Minn. 105), 1709.
Ensley Lumber Co. v. Lewis (121 Ala. 94), 599.
Epperson v. Nugent (57 Miss. 45), 130, 132.
Equitable Foundry Co. v. Hersee (103 N. Y. 25), 908, 909.
Equitable Gas L. Co. v. Baltimore Coal Tar & Mfg. Co. (63 Md. 285), 1721.
Erdall v. Atwood (79 Wis. 1), 955.
Erickson v. Fisher (51 Minn. 300), 1841.
Erie City Iron Works v. Barber (106 Pa. St. 125), 875.
Ernst v. Crosby (140 N. Y. 364), 1022.
Erskine v. Swanson (45 Neb. 767), 1235, 1237, 1238.
Erskine v. Plummer (7 Me. 447), 337.
Erwin v. Arthur (61 Mo. 386), 491.
Erwin v. Harris (87 Ga. 333), 779.
Erwin v. Maxwell (3 Murphey, 241), 1237, 1243, 1268, 1311.
Erwin v. Torrey (8 Martin, 90), 1479.
Estabrook v. Swett (116 Mass. 303), 915.
Estate of Davis (5 Whart. 530), 1423.
Estep v. Fenton (66 Ill. 467), 1393.
Esterly v. Campbell (44 Mo. App. 621), 670.
Esterly Harvesting Mach. Co. v. Berg (52 Neb. 147), 871.
Estey v. Birnbaum (9 S. Dak. 174), 1425.
Estey v. Truvel (25 Mo. App. 238), 1571.
Etchepane v. Aguirre (91 Cal. 288), 960, 964.
Etheridge v. Vernoy (70 N. C. 713), 880.
Eureka Co. v. Edwards (71 Ala. 248), 109.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Eureka Fertilizer Co. v. Baltimore Copper Rolling Co. (78 Md. 179), 1255.
Eureka Iron Works v. Bresnahan (66 Mich. 489), 953.
Evans v. Collins (5 Q. B. 804), 876.
Evans v. Dravo (24 Pa. St. 62), 947.
Evans v. Edmonds (13 C. B. 777), 876, 1223.
Evans v. Gerry (174 Ill. 595), 871, 893, 936.
Evans v. Scott (89 Pa. St. 136), 960, 964, 988.
Evansville, etc. R. Co. v. Erwin (84 Ind. 457), 543, 554, 1660.
Everett v. Hall (67 Me. 498), 556, 588, 592, 597, 630.
Everett v. Parks (62 Barb. 9), 738.
Everett v. Taylor (14 Utah, 242), 964, 1132.
Everingham v. Meighan (55 Wis. 354), 1031.
Eversman v. Clements (6 Colo. App. 224), 964.
Everson v. Carpenter (17 Wend. 419), 121.
Evert v. Kleimenhagen (6 S. Dak. 221), 1055.
Ewing v. French (1 Blackf. 353), 25.
Ewins v. Gordon (49 N. H. 444), 263.
Exhaust Ventilator Co. v. Chicago, etc. R. Co. (66 Wis. 218), 667, 668.
Exhaust Ventilator Co. v. Railroad Co. (6 Wis. 454), 670, 1402.
Eyers v. Hadden (70 Fed. R. 648), 1242, 1807.
Eyre v. Eyre (19 N. J. Eq. 42), 947.
Ezell v. Franklin (2 Sneed, 236), 1281, 1294.
Ezzard v. Frick (76 Ga. 512), 602.
Fahey v. Esterly Mach. Co. (3 N. Dak. 220), 1384, 1386.
Faikney v. Reynous (4 Burr. 2069), 1012, 1015.
Fail v. McRee (36 Ala. 61), 1712.
Fairbank Canning Co. v. Metzger (118 N. Y. 260), 1222, 1235, 1237, 1335, 1356, 1358, 1392, 1393, 1395.
Fairbanks v. Eureka Co. (67 Ala. 109, 599.
Fairbanks v. Malloy (16 Ill. App. 277), 629.
Fairbanks v. Phelps (22 Pick. 535), 588, 610.
Fairchild v. McMahon (139 N. Y. 290), 893, 937.
Fairfax v. N. Y. Cent. R. Co. (73 N. Y. 167), 1743.
Fairfield v. Madison Mfg. Co. (38 Wis. 346), 658, 660, 1155, 1208.
Fairfield Bridge Co. v. Nye (60 Me. 372), 960.
Fairmount Glass Works v. Gunden-Martin Woodenware Co. (— Ky. —), 224.
Fairmount Ry. Co. v. Stuller (154 Pa. St. 375), 122.
Faisst v. Waldo (57 Ark. 270), 605.
Fait & Slagle Co. v. Truxton (1 Pennew. 24), 905, 924.
Falconer v. Smith (18 Pa. St. 130), 1248, 1844.
Falk, Ex parte (14 Ch. Div. 446), 1570, 1583.
Falk v. Fletcher (18 C. B., N. S., 403), 787.
Fallon v. Murray (16 Mo. 168), 1798.
Falls v. Gaither (9 Port. 614), 247.
Falvey v. Richmond (87 Ga. 99), 1181.
Farebrother v. Simmons (5 B. & Ald. 333), 461, 462.
Fareira v. Gabell (89 Pa. St. 89), 1032.
Fargo Gaslight Co. v. Fargo Gas Co. (4 N. Dak. 218), 1841, 1843.
Farina v. Home (16 M. & W. 119), 387, 524, 1194, 1493.
Farley v. Lincoln (51 N. H. 577), 148, 924.
Farley v. Parker (6 Oreg. 105), 72.
Farlow v. Ellis (15 Gray, 229), 549, 551, 552.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Farmeloe v. Bain (1 Com. Pl. Div. 445), 1504.
Farmer v. Gray (16 Neb. 401), 401.
Farmer v. Robinson (2 Camp. 339), 470.
Farmers' Nat. Bank v. Atkinson (74 N. Y. 587), 169.
Farmers', etc. Bank v. Logan (74 N. Y. 568), 776, 780.
Farmers' Phosphate Co. v. Gill (69 Md. 537), 492, 519, 740.
Farmers' Stock-Breeding Ass'n v. Scott (53 Kan. 534), 1247, 1254.
Farmington v. Jones (36 N. H. 271), 186.
Farnsworth v. Duffner (142 U. S. 43), 879.
Farnum v. Pitcher (151 Mass. 470), 1035, 1194.
Farquhar v. McAlevy (142 Pa. St. 233), 569, 580, 581, 600.
Farr v. Sims (Rich. Eq. Cas. 122), 945.
Farr v. Stevens (26 Vt. 299), 1424.
Farr v. Sumner (12 Vt. 32), 109.
Farr v. Swigart (13 Utah, 150), 1132.
Farrar v. Churchill (135 U. S. 247), 879.
Farrar v. Peterson (52 Iowa, 420), 1288.
Farrell v. Richmond, etc. R. Co. (102 N. C. 390), 1542, 1571, 1582.
Farrington v. Putnam (90 Me. 405), 142.
Farrington v. Smith (77 Mich. 550), 1380, 1382.
Farrow v. Andrews (69 Ala. 96), 1245.
Farrow v. Cochran (72 Me. 309), 1805.
Farwell v. Hanchett (120 Ill. 573), 915, 928.
Farwell v. Kloman (45 Neb. 424), 927.
Farwell v. Myers (59 Mich. 179), 909.
Farwell v. Rogers (4 Cush. 460), 1136.
Farwell v. Solomon (170 Mass. 457), 1092.
Faulds v. Yates (57 Ill. 416), 208.
Faulkner v. Klamp (16 Neb. 174), 918.
Fawcett v. Osborn (32 Ill. 411), 269, 923, 1302.
Fay v. Burdett (81 Ind. 433), 72, 73, 74, 77.
Fay v. Oliver (20 Vt. 118), 914.
Fay v. Richmond (43 Vt. 25), 1281.
Fay v. Wheeler (44 Vt. 292), 328.
Fechheimer v. Baum (37 Fed. R. 167), 878, 893, 895.
Feineman v. Sachs (33 Kan. 621), 1013, 1019, 1027.
Feise v. Wray (3 East, 93), 1530, 1532, 1604.
Feldman v. Shea (— Idaho, —), 188.
Felker v. Emerson (16 Vt. 653), 178.
Fell v. Muller (78 Ind. 507), 1633.
Fell v. Newberry (106 Mich. 542), 1709.
Fellows v. Northrup (39 N. Y. 117), 1459.
Fells v. Read (3 Ves. 70). 1719.
Felsenthal v. Hawks (50 Minn. 178), 1394.
Felthouse v. Brindley (11 C. B., N. S., 869), 234, 238.
Fenelon v. Hogaboom (31 Wis. 172), 543.
Fenkhausen v. Fellows (20 Nev. 312), 1542.
Fennell v. Ridler (5 Barn. & Cr. 406), 1056.
Fenton v. Braden (2 Cranch, 550), 207.
Fenton v. Ham (35 Mo. 409), 947.
Fenton v. White (1 South. 100), 124.
Ferdon v. Cunningham (20 How. Pr. 154), 1051.
Ferguson v. Carrington (9 B. & C. 59), 912, 1411.
Ferguson v. Clifford (37 N. H. 86), 542, 543, 554, 649.
Ferguson v. Hosier (58 Ind. 438), 1395.
Ferguson v. Northern Bank of Kentucky (14 Bush, 555), 702, 714.
Ferguson v. Wilson (— Mich. —), 202.
Ferrier v. Storer (63 Iowa, 484), 244, 247.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Ferris v. Spooner (102 N. Y. 10), 1089.
Fessenden v. Mussey (11 Cush. 127), 434, 451, 456.
Fetrow v. Wiseman (40 Ind. 148), 109.
Fettiplace v. Gorges (1 Ves. Jr. 46), 135.
Fettyplace v. Dutch (13 Pick. 388), 788.
Feurt v. Rowell (62 Mo. 524), 649.
Fickett v. Swift (41 Me. 65), 311.
Fiegel v. Latour (81½ Pa. St. 448), 1831.
Field v. Lucas (21 Ga. 447), 70.
Field v. Mayor (6 N. Y. 179), 200.
Field v. Morse (54 Neb. 789), 875.
Field v. Runk (22 N. J. L. 525), 1124.
Fields v. Williams (91 Ala. 502), 588. 592.
Fifield v. Elmer (25 Mich. 48), 599.
Figge v. Hill (61 Iowa, 430), 1235, 1238, 1244.
Filkins v. Whyland (24 Barb. 379), 1255.
Filley v. Pope (115 U. S. 213), 810, 1138, 1139, 1155, 1208.
Filley v. Walker (28 Neb. 506), 1106.
Finch v. Barclay (87 Ga. 393), 1050.
Finch v. Gregg (126 N. C. 176), 1816.
Finch v. Mansfield (99 Mass. 89), 739, 1018, 1449.
Findley v. Cooley (1 Blackf. 262), 947.
Findley v. Deal (69 Ga. 359), 578.
Fine v. Hornsby (2 Mo. App. 61), 331.
Finlay v. Ludden & Bates South. Music House (105 Ga. 264), 625.
Finlayson v. Finlayson (17 Oreg. 347), 880.
Finley v. Quirk (9 Minn. 194), 1056.
Finn v. Clark (10 Allen, 479), 747.
Finn v. Rose (12 Iowa, 565), 139.
Finney v. Apgar (31 N. J. L. 266), 293, 316, 324.
Fiqued v. Allison (12 Mich. 330), 17, 1411.
First Baptist Church v. Bigelow (16 Wend. 28), 461.
First Commercial Bank v. Newton (117 Mich. 433), 138.
First Nat. Bank v. Buchanan (87 Tenn. 32), 1422, 1429.
First Nat. Bank v. Colter (61 Ind. 152), 1794.
First Nat. Bank v. Cook Carriage Co. (70 Miss. 587), 564.
First Nat. Bank v. Crocker (111 Mass. 163), 774.
First Nat. Bank v. Crowley (24 Mich. 492), 520, 754.
First Nat. Bank v. Dearborn (115 Mass. 219), 752, 788.
First Nat. Bank v. Freeman (47 Mich. 408), 144.
First Nat. Bank v. Hughes (—— Cal. ——), 1805.
First Nat. Bank v. Hummel (14 Colo. 259), 642.
First Nat. Bank v. Kelley (57 N. Y. 34), 792.
First Nat. Bank of Elgin v. Kilbourne (20 N. S. R. 681), 642.
First Nat. Bank v. Larsen (60 Wis. 206), 818.
First Nat. Bank v. Lowry (36 Neb. 290), 960.
First Nat. Bank v. Mass. Co. (123 Mass. 330), 1309.
First Nat. Bank v. McAndrews (5 Mont. 325), 51, 752.
First Nat. Bank v. Oskaloosa Pkg. Co. (66 Iowa, 41), 1031, 1032.
First Nat. Bank v. Pettit (9 Heisk. 447), 792.
First Nat. Bank v. Reno (73 Iowa, 145), 18, 485, 502.
First Nat. Bank v. Ridenour (46 Kan. 718), 955.
First Nat. Bank v. Robinson (105 Iowa, 463), 1281.
First Nat. Bank v. Schmidt (6 Colo. App. 216), 1565.
First Nat. Bank v. Schween (127 Ill. 573), 23, 642.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

First Nat. Bank v. Shaw (61 N. Y. 283), 169.
First Nat. Bank v. Tootle (59 Neb. 44), 908.
First Nat. Bank v. Tufts (53 Kan. 710), 599, 603, 604.
Fish v. Benedict (74 N. Y. 613), 50.
Fish v. Cleland (33 Ill. 237), 872.
Fish v. Roseberry (22 Ill. 288), 1340.
Fishback v. Van Dusen (33 Minn. 111), 29, 543, 549, 551, 552, 553, 554, 721.
Fisher v. Boynton (87 Me. 395), 1129, 1134.
Fisher v. Brown (104 Mass. 259), 1787.
Fisher v. Fredenhall (21 Barb. 82), 1431.
Fisher v. Kuhn (51 Miss. 480), 426.
Fisher v. Lord (63 N. H. 514), 1019, 1027.
Fisher v. Mellen (103 Mass. 503), 875.
Fisher v. Mowbray (8 East, 330), 134.
Fisher v. Pollard (2 Head, 314), 1272.
Fitch v. Archibald (29 N. J. L. 160), 1340.
Fitch v. Burk (38 Vt. 683), 336, 964.
Fitts v. Hall (9 N. H. 441), 109, 120.
Fitzgerald v. Evans (49 Minn. 541), 1273.
Fitzgerald v. Gorham (4 Cal. 289), 960.
Fitzpatrick v. Osborne (50 Minn. 261), 1397, 1807, 1835.
Fitzsimmons v. Express Co. (40 Ga. 330), 392.
Fitzsimmons v. Woodruff (1 Thomp. & C. 3), 305.
Fixen v. Blake (47 Minn. 540), 1843.
Flack v. Gottschalk Co. (80 Md. 368), 74.
Flagg v. Baldwin (38 N. J. Eq. 219), 1031, 1039, 1043.
Flagg v. Gilpin (17 R. I. 10), 1031.
Flanagan v. Demarest (3 Robt. 173), 1161.
Flanders v. Maynard (58 Ga. 56), 543.
Flanders v. Putney (58 N. H. 358), 1162.
Flannagans, Ex parte (2 Hughes, 264), 49.
Flannery v. Rohrmayer (46 Conn. 558), 1079, 1389.
Flash v. American Glucose Co. (38 La. Ann. 4), 816, 1805.
Fleck v. Warner (25 Kan. 492), 569, 629, 633.
Fleeman v. McKean (25 Barb. 474), 891.
Fleig v. Sleet (43 Ohio St. 51), 1433, 1436.
Fleischmann v. Stern (90 N. Y. 110), 1428.
Fleming v. Beck (48 Pa. St. 309), 1831.
Fleming v. Gilbert (3 Johns. 528), 1106.
Fleming v. Hanley (21 R. I. 141), 942.
Fleming v. Townsend (6 Ga. 103), 960.
Fletcher v. Cole (23 Vt. 114), 1148.
Fletcher v. Howard (2 Aik. 115), 960.
Fletcher v. Ingram (46 Wis. 191), 527.
Fletcher v. Livingston (153 Mass. 388), 366.
Fletcher v. Nelson (6 N. D. 94), 485, 1247, 1281, 1293.
Fletcher v. Young (69 Ga. 591), 1273.
Flick v. Wetherbee (20 Wis. 392), 1827.
Flinn v. St. John (51 Vt. 334), 1057.
Flint v. Corbitt (6 Daly, 429), 305.
Flint v. Gibson (106 Mass. 391), 673.
Flint v. Lyon (4 Cal. 17), 1345.
Florence Mining Co. v. Brown (124 U. S. 385), 1095.
Flower v. Peck (1 B. & A. 428), 1073.
Floyd Acceptances, The (74 U. S. 666), 191.
Floyd v. Patterson (72 Tex. 202), 1031.
Flynn v. Allen (57 Pa. St. 482), 1303.
Flynn v. Dougherty (91 Cal. 669), 315.
Flynn v. Messenger (28 Minn. 208), 183.
Fogg v. Rodgers (84 Ky. 558), 1209.

References are to sections: Vol. I, §§1-797; Vol. II, §§ 798-1850.

Fogel v. Brubaker (122 Pa. St. 7), 1211, 1213, 1311, 1334, 1340.
Foggart v. Blackweller (4 Ired. 238), 862, 1229, 1237.
Foley v. Cowgill (5 Blackf. 18), 937.
Foley v. Felrath (98 Ala. 176), 676, 677, 684.
Foley v. Holtry (43 Neb. 133), 875.
Foll's Appeal (91 Pa. St. 437), 1728.
Folsom v. Carli (5 Minn. 333), 950.
Folsom v. Cornell (150 Mass. 115), 809, 964.
Fontaine v. Bush (40 Minn. 141), 356, 365.
Fonville v. Casey (1 Murph. 389), 200.
Foos v. Sabin (84 Ill. 564), 1334, 1690.
Foot v. Bently (44 N. Y. 166), 1255, 1320.
Foot v. Marsh (51 N. Y. 288), 702.
Foote v. Cobb (18 Ala. 585), 970.
Forbes v. Railroad Co. (133 Mass. 154), 792.
Forcheimer v. Stewart (65 Iowa, 598), 1242, 1265, 1298, 1336, 1340.
Ford v. Cobb (20 N. Y. 344), 646.
Ford v. Fothergill (1 Esp. 211), 128.
Ford v. Fothergill (Peake, N. P., 229), 127.
Ford v. Oliphant (32 S. W. R. 437), 941.
Ford v. Phillips (1 Pick. 202), 121.
Fordice v. Gibson (129 Ind. 7), 754.
Foreman v. Ahl (55 Pa. St. 325), 1053, 1054.
Fores v. Johnes (4 Esp. 97), 1007.
Forest City Ins. Co. v. Morgan (22 Ill. App. 198), 1259.
Forke v. Arms Co. (— Tex. —-), 1372.
Forrer v. Nash (35 Beav. 167), 1096.
Forrest v. Hamilton (98 Ind. 91), 569.
Forrest v. Nelson (108 Pa. St. 481), 600.
Forsaith Mach. Co. v. Mengel (99 Mich. 280), 669, 1380.
Forsyth v. Jervis (1 Stark. 437), 16.
Forsyth v. Mann (68 Vt. 116), 308, 1768.
Forsyth v. Mathews (14 Pa. St. 100), 960, 966.
Fosdick v. Greene (27 Ohio St. 484), 1787.
Fosdick v. Schall (99 U. S. 235), 569, 590, 647.
Foss v. Cummings (149 Ill. 353), 1040.
Foss v. Hildreth (10 Allen, 76), 87.
Foss-Schneider Brewing Co. v. Bullock (16 U. S. App. 311), 1090, 1380.
Foster v. Adams (60 Vt. 392), 1664.
Foster v. Caldwell (18 Vt. 176), 1237.
Foster v. Charles (7 Bing. 107), 856, 876.
Foster v. Dawber (6 Exch. 839), 805.
Foster v. Frampton (6 B. & C. 107), 1577, 1601.
Foster v. Hall (12 Pick. 89), 953.
Foster v. Hill (36 N. H. 526), 1428.
Foster v. Lumberman's Mining Co. (68 Mich. 188), 205, 211, 234.
Foster v. Mabe (4 Ala. 402), 334.
Foster v. Mackinnon (L. R. 4 C. P. 711), 266.
Foster v. Magill (119 Ill. 75), 527.
Foster v. Mining Co. (68 Mich. 188), 702.
Foster v. Pettibone (7 N. Y. 433), 21.
Foster v. Ropes (11 Mass. 10), 508, 511, 740.
Foster v. Taylor (3 Nev. & Man. 244), 1045.
Foster v. Thurston (11 Cush. 322), 1019.
Foster v. Warner (49 Mich. 641), 624.
Foster v. Wooten (67 Miss. 540), 1053.
Fothergill v. Rowland (L. R. 17 Eq. 132), 1722.
Fourth Nat. Bank v. St. Louis Cotton Comp. Co. (11 Mo. App. 333), 1507.
Fowler v. Bowery Sav. Bank (113 N. Y. 450), 909.
Fowler v. Frisbie (3 Conn. 320), 970.
Fowler v. McTaggart (1 East, 522), 1548, 1549.
Fowler Elevator Co. v. Cottrell (38 Neb. 512), 426.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Fox v. Harding (7 Cush. 516), 1762.
Fox v. Harvester, etc. Works (83 Cal. 333), 1344.
Fox v. Hazelton (10 Pick. 275), 212.
Fox v. Hills (1 Conn. 294), 970.
Fox v. Kitton (19 Ill. 519), 1089, 1090.
Fox v. Prickett (34 N. J. L. 13), 56.
Fox v. Turner (1 Ill. App. 153), 229, 233.
Fox v. Utter (6 Wash. 299), 310.
Foye v. Patch (132 Mass. 105), 451.
Fragano v. Long (4 B. & C. 219), 393, 736, 740, 741, 757, 1181, 1496.
Fraley v. Bispham (10 Pa. St. 320), 1245, 1320.
Frame v. Coal Co. (97 Pa. St. 309), 1451, 1452.
Francis v. Barry (69 Mich. 311), 428.
Francis v. Cockrell (L. R. 5 Q. B. 501), 1346.
Francis-Chenoweth Hardware Co. v. Gray (104 Ala. 236), 496, 498.
Frank v. Batten (49 Hun, 91), 603.
Frank v. Eltringham (65 Miss. 281), 434, 445.
Frank v. Harrington (36 Barb. 415), 342, 343.
Frank v. Hoey (128 Mass. 263), 739.
Frank v. Lanier (91 N. Y. 112), 838, 1849.
Frank v. Miner (50 Ill. 444), 963.
Franklin v. Long (7 Gill & J. 407), 199, 816, 1805.
Franklin v. Miller (4 A. & E. 599), 1097.
Franklin Sugar Ref. Co. v. Collier (89 Iowa, 69), 906.
Fraschiers v. Henriques (6 Abb. Prac., N. S., 251), 1587.
Fraser v. Witt (L. R. 7 Eq. Cas. 64), 1527, 1541.
Frasure v. Zimmerly (25 Ill. 202), 820.
Frazier v. Harvey (34 Conn. 469), 1311.
Frazier v. Simmons (139 Mass. 531), 1670.
Frazier v. Smith (60 Ill. 145), 1831.
Frazier v. Thompson (2 Watts & Serg. 235), 1004.
Freed v. Brown (55 Ind. 310), 69, 72, 73.
Freehling v. Bresnahan (61 Mich. 540), 950.
Freeman v. Bridger (4 Jones L. 1), 129, 132.
Freeman v. Cooke (2 Exch. 654), 170, 845.
Freeman v. Harwood (49 Me. 195), 1787.
Freeman v. Hensley (—— Cal. ——), 964.
Freeman v. Holmes (62 Ga. 556), 185.
Freeman v. Kraemer (63 Minn. 242), 153, 779.
Freeman v. Nichols (116 Mass. 309), 549, 1482.
Freeman v. Pope (L. R. 5 Ch. App. 538), 974.
Freeman v. Robinson (38 N. J. L. 383), 186.
Freeman v. Topkis (1 Marv. 174), 905.
Freeport Stone Co. v. Carey (42 W. Va. 276), 549.
Frees v. Baker (81 Tex. 216), 955.
Freeth v. Burr (L. R. 9 C. P. 208), 1141, 1145, 1148.
Freiberg v. Steenbock (54 Minn. 509), 964, 1193.
French v. Fitch (67 Mich. 492), 936.
French v. French (8 Ohio, 214), 86, 87.
French v. Hall (9 N. H. 137), 965.
French v. Hay (22 Wall. 231), 577.
French v. Osmer (67 Vt. 427), 589, 592, 629.
French v. Parish (14 N. H. 496), 1798.
French v. Vining (102 Mass. 132), 869, 1349, 1357.
Frenzel v. Miller (37 Ind. 1), 863.
Fresno Milling Co. v. Fresno Canal, etc. Co. (126 Cal. 640), 1099.
Freyman v. Knecht (78 Pa. St. 141), 820, 1817.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1870.

Frick v. Hilliard (95 N. C. 117), 583.
Frieber v. Stover (30 Ark. 727), 138.
Friedberg v. Moffett (91 Hun, 17), 1420.
Friedlander v. Railroad Co. (130 U. S. 416), 166.
Friend Bros. Clothing Co. v. Hulbert (98 Wis. 183), 914, 918.
Frink v. Thomas (20 Oreg. 265), 914.
Fripp v. Fripp (Rice's Ch. 84), 804.
Frisbee v. Chickering (115 Mich. 185), 896, 901.
Fritz v. Stover (22 Wall. 198), 1455.
Frohreich v. Gammon (28 Minn. 476), 1257, 1835.
Frolich v. Alexander (36 Ill. App. 428), 1013.
Fromer v. Stanley (95 Wis. 56), 879, 905.
Frost v. Blanchard (97 Mass. 155), 1254.
Frost v. Deering (21 Me. 156), 451.
Frost v. Gage (3 Allen, 560), 996.
Frost v. Hill (3 Wend. 386), 462.
Frost v. Knight (L. R. 7 Ex. 111), 1088, 1089, 1711, 1753.
Frost v. Lowry (15 Ohio, 200), 915, 917, 919.
Frost v. Parker (65 Iowa, 178), 139.
Frost v. Woodruff (54 Ill. 155), 508.
Frostburg Mining Co. v. New England Glass Co. (9 Cush. 115), 366.
Frue v. Houghton (6 Colo. 318), 1724, 1727.
Fruit Co. v. McKinney (65 Mo. App. 220), 401.
Fry v. Mobile Savings Bank (75 Ala. 473), 714.
Fry-Sheckler Co. v. Iowa Brick Co. (104 Iowa, 494), 1387.
Frye v. Milligan (10 Ont. 509), 1223.
Fuller v. Bean (34 N. H. 290), 213, 478, 499, 552, 674, 714.
Fuller v. Byrne (102 Mich. 461), 619.
Fuller v. Duren (36 Ala. 73), 13, 15, 17, 1411.
Fuller v. Eames (108 Ala. 464), 619.
Fuller v. McHenry (83 Wis. 573), 138.
Fuller v. Parrish (3 Mich. 211), 40.
Fullington v. Northwestern, etc. Ass'n (48 Minn. 490), 974.
Fulton Bros. v. Upper Canada Furniture Co. (9 Ontario Appeal Reports, 211), 228.
Funke v. Allen (54 Neb. 407), 1694.
Furman v. Railroad Co. (106 N. Y. 579), 774.
Furnas v. Friday (102 Ind. 129), 856.
Furneaux v. Easterly (36 Kan. 539), 1288, 1384, 1386.
Gaar v. Hicks (— Tenn. Ch. —), 1806, 1812.
Gaar v. Stark (— Tenn. Ch. —), 1826.
Gabannon v. Kreeft (L. R. 10 Ex. 274), 784, 787, 792.
Gachet v. Warren (72 Ala. 288), 1314.
Gaddis v. Leeson (55 Ill. 83), 416.
Gadsden v. Lance (1 McMul. Eq. 87), 331.
Gaff v. Homeyer (59 Mo. 345), 363.
Gage v. Fisher (5 N. D. 297), 1728.
Gaines v. McKinley (1 Ala. 446), 1281, 1294.
Gainsville Nat. Bank v. Bamberger (77 Tex. 48), 878, 892, 895, 901.
Galbraith v. Holmes (15 Ind. App. 34), 416.
Galbreath v. Cook (30 Ark. 417), 952.
Gale v. Corey (112 Ind. 39), 1417.
Gale Mfg. Co. v. Moore (46 Kan. 324), 681.
Gale Sulky-Harrow Mfg. Co. v. Stark (45 Kan. 606), 816, 1805.
Galena, etc. R. Co. v. Ennor (123 Ill. 505), 1787.
Galigher v. Jones (129 U. S. 193), 1787, 1788.
Gallagher v. Waring (9 Wend. 20), 1320.
Gallick v. Bordeaux (22 Mont. 470), 964.

References are to sections: Vol. I. §§ 1-797; Vol. II, §§ 798-1850.

Galligan v. Fannan (7 Allen, 255), 1019, 1027.
Gallober v. Martin (33 Kan. 252), 953.
Gallop v. Newman (7 Pick. 282), 1201.
Galloway v. Holmes (1 Doug. 330), 1663.
Galloway v. Week (54 Wis. 604), 499, 516, 520, 702.
Galpin v. Atwater (29 Conn. 93), 1254.
Galpin v. Wilson (40 Iowa, 90), 67.
Galvin v. Bacon (11 Me. 28), 628.
Galvin v. Mackenzie (21 Oreg. 184), 361.
Gamble v. Tripp (99 Cal. 223), 942.
Gammage v. Alexander (14 Tex. 414), 754.
Gammell v. Gunby (52 Ga. 504), 1314.
Gammon v. Abrams (53 Wis. 323), 818.
Gangwere, In re (14 Pa. St. 417), 7, 67.
Gannard v. Eslava (20 Ala. 732), 970.
Gant v. Shelton (3 B. Mon. 420), 1242.
Garbracht v. Com. (96 Pa. St. 449), 739.
Garbutt v. Bank (22 Wis. 384), 906.
Garbutt v. Watson (5 Barn. & Ald. 513), 299, 300, 313.
Gardiner v. Gray (4 Camp. 144), 446, 1321, 1327.
Gardiner v. Suydam (7 N. Y. 357), 714.
Gardinier v. Tubbs (21 Wend. 169), 963.
Gardner v. Dutch (9 Mass. 427), 702, 714.
Gardner v. Grout (2 C. B. 340), 400.
Gardner v. Howland (2 Pick. 599), 380, 483, 1201.
Gardner v. Joy (9 Metc. 177), 307, 324.
Gardner v. Kleinke (46 N. J. Eq. 90), 974.
Gardner v. Lane (12 Allen, 39), 217, 272, 274, 275, 695, 746.
Gardner v. Trenary (65 Iowa, 646), 881, 1841.
Garfield v. Paris (96 U. S. 557), 362, 369, 373.
Garr v. Haskett (86 Ind. 373), 131.
Garrard v. Frankel (30 Beav. 445), 853.
Garrett v. Crooks (15 La. Ann. 483), 41.
Garretson v. Selby (37 Iowa, 529), 746.
Garrow v. Brown (Winston's Eq. 46, 86 Am. Dec. 450), 65.
Gartner v. Corwine (57 Ohio St. 246), 1239.
Gartner v. Hand (86 Ga. 558), 231.
Gartrell v. Stafford (12 Neb. 545), 449.
Gary v. Jacobson (55 Miss. 204), 947.
Gassett v. Glazier (165 Mass. 473), 937.
Gates v. Bliss (43 Vt. 299), 820.
Gates v. Nelles (62 Mich. 444), 234.
Gates v. Raymond (106 Wis. 657), 918.
Gatling v. Newell (9 Ind. 572), 918.
Gatrell v. Clay (81 Ga. 327), 603.
Gatzmer v. Moyer (—— Pa. St. ——), 492.
Gault v. Brown (48 N. H. 183), 349, 362, 401, 420.
Gavin v. Armistead (57 Ark. 574), 905, 906.
Gaw v. Bennett (153 Pa. St. 247), 1031, 1032, 1036.
Gay v. Ballou (4 Wend. 403), 122, 123, 132.
Gay v. Dare (103 Cal. 454), 685.
Gay v. Osborne (102 Wis. 641), 918.
Gaylor v. Copes (16 Fed. R. 49), 1307.
Gaylord Mfg. Co. v. Allen (53 N. Y. 515), 1380, 1390, 1391, 1392.
Gaylord v. Soragen (32 Vt. 110), 1013, 1027.
Geary v. Physic (7 D. & R. 653), 451.
Gehl v. Milwaukee Produce Co. (105 Wis. 573), 1650, 1690, 1692.
Geib v. Reynolds (35 Minn. 331), 1423.
Geiger v. Cook (3 W. & S. 266), 834.
Geist v. Stier (134 Pa. St. 216), 625.
Gelston v. Sigmund (27 Md. 334), 211.
Gennert v. Wuestner (53 N. J. Eq. 302), 1057.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Genesee County Savings Bank v. Michigan Barge Co. (52 Mich. 164), 878, 895.
Gentilli v. Starace (133 N. Y. 140), 1265, 1382.
Gentry v. Templeton (47 Mo. App. 55), 603.
George v. George (47 N. H. 27), 1052.
George v. Johnson (6 Humph. 36), 868, 869, 935.
George v. Norris (23 Ark. 121), 960.
George v. Skivington (L. R. 5 Ex. Cas. 1), 878.
George v. Tufts (5 Colo. 162), 600.
Gerhard v. Bates (2 El. & Bl. 476), 936.
Gerli v. Poidebard Silk Mfg. Co. (57 N. J. L. 432), 1148.
German Sav. and Loan Society v. De Lashmutt (67 Fed. R. 399), 72.
German Savings Inst. v. De La Vergne Co. (36 U. S. App. 184), 1078.
German Savings Society v. Weber (16 Wash. 95), 647.
Gerow v. Castello (11 Colo. 560), 568, 569, 573, 693.
Gerrish v. Clark (64 N. H. 492), 569, 603.
Gerrish v. Maher (70 Ill. 470), 1458.
Gerst v. Jones (32 Gratt. 518), 1214, 1344.
Gerwig v. Sitterly (56 N. Y. 214), 1429.
Getchell v. Jewett (4 Greenl. 350), 425.
Gether v. Capper (18 C. B. 865), 234.
Getty v. Roundtree (2 Pin. 379), 1311, 1344, 1844.
Gibbons v. Bente (51 Minn. 499), 1091.
Gibbons v. Robinson (63 Mich. 146), 775.
Gibbs v. Benjamin (45 Vt. 124), 367, 714.
Gibson v. Carruthers (8 M. & W. 321), 1526, 1551.
Gibson v. Cranage (39 Mich. 49), 665, 666.
Gibson v. Holland (L. R. 1 C. P. 1), 432.
Gibson v. Pelkie (37 Mich. 380), 199, 274.
Gibson v. Soper (6 Gray, 279), 70, 72, 77, 79.
Gibson v. Stevens (49 U. S. 384), 166, 491, 709, 788, 1197.
Gibson v. Tobey (46 N. Y. 637), 1423, 1425, 1433.
Gibson v. Vail (53 Vt. 473), 661, 670, 1402.
Giddey v. Altman (27 Mich. 206), 628.
Gieve, In re (1 Q. B. 794), 203.
Giffert v. West (33 Wis. 617), 1235, 1817.
Gilbert v. Decker (53 Conn. 401), 963.
Gilbert v. Gauger (8 Biss. 214), 1032.
Gilman v. Hill (36 N. H. 311), 358.
Gilbert v. Holmes (64 Ill. 548), 257.
Gilbert v. Lichtenberg (98 Mich. 417), 401, 402.
Gilbert v. Moline Plough Co. (119 U. S. 491), 1254.
Gilbert v. National Cash Register Co. (176 Ill. 288), 583.
Gilbert v. Stockman (76 Wis. 62), 446.
Gilbert v. Stockman (81 Wis. 602), 947.
Gilchrist v. Hilliard (53 Vt. 592), 1303.
Giles v. Bradley (2 Johns. Cas. 253), 264.
Giles v. Simonds (15 Gray, 441), 336, 626, 1191.
Gilkerson-Sloss Com. Co. v. Salinger (56 Ark. 294), 138.
Gill v. Benjamin (64 Wis. 362), 527, 529, 1380, 1392.
Gill v. Bicknell (2 Cush. 355), 461, 462.
Gill v. Bradley (21 Minn. 15), 1417.
Gill v. Browne (53 Fed. R. 394), 1134.
Gill v. De Armant (90 Mich. 430), 599.
Gill v. Frank (12 Oreg. 507), 1194.
Gill v. Kaufman (16 Kan. 571), 731, 1320.
Gill v. Lumber Co. (151 Pa. St. 534), 1163.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Gill v. Read (5 R. I. 343), 184.
Gillespie v. Bai e/ (12 W. Va. 70), 95.
Gillespie v. Cheney (1896, 2 Q. B. 59), 1258, 1344.
Gillette v. Stoddart (30 Ill. App. 231), 960.
Gilliat v. Roberts (19 L. J. Ex. 410), 400.
Gilligan v. Lord (51 Conn. 562), 966.
Gilliland v. Phillips (1 S. C. 152), 1048.
Gillman v. Carbutt (61 L. T. R., N. S., 281), 1505.
Gilman v. Andrews (66 Iowa, 116), 1787.
Gilman v. Andrus (28 Vt. 241), 185.
Gilman v. Hill (36 N. H. 311), 324, 359, 518, 520, 523, 764.
Gilmore v. Newton (9 Allen, 171), 628.
Gilmore v. Wilbur (12 Pick. 120), 1132.
Gilmore v. Williams (162 Mass. 351), 1836.
Gilmour v. Supple (11 Moore, P. C. 566), 281, 515, 725.
Gindre v. Kean (31 Abb. N. C. 100), 49.
Gipps Brewing Co. v. De France (91 Iowa, 108), 1029.
Gerard v. Taggart (5 Serg. & R. 19), 1643, 1682, 1693.
Girarday v. Richardson (1 Esp. 13), 1022.
Giroux v. Stedman (145 Mass. 439), 1357.
Gist v. W. U. Tel. Co. (45 S. C. 344), 1043.
Gittings v. Nelson (86 Ill. 591), 202.
Glaholm v. Hays (2 M. & G. 257), 861.
Glasgow v. Nicholson (25 Mo. 29), 527.
Glaspell v. N. P. R. Co. (43 Fed. R. 900), 1843.
Glass v. Whitney (22 Q. B. 290), 714.
Glasscock v. Hazell (109 N. C. 145), 658.
Glaubensklee v. Low (29 Ill. App. 408), 139.
Gleason v. Beers (59 Vt. 581), 23.
Glenn v. Smith (2 G. & J. 493), 1423, 1425, 1427.
Glisson v. Heggie (105 Ga. 30), 620.
Globe Milling Co. v. Elevator Co. (44 Minn. 153), 153, 549, 552, 557.
Goad v. Johnson (6 Heisk. 340), 1356, 1357.
Godchaux v. Mulford (26 Cal. 316), 966.
Goddard v. Binney (115 Mass. 450), 306, 324, 754, 757, 1122, 1187.
Goddard v. Weil (165 Pa. St. 419), 1197.
Godfrey v. Crisler (121 Ind. 203), 1424, 1429.
Godfrey v. Miller (80 Cal. 420), 953.
Godts v. Rose (17 C. B. 229), 387, 740, 1493.
Godts v. Rose (25 L. J. C. P. 61), 775.
Gold Mining Co. v. National Bank (96 U. S. 640), 1046.
Golden v. Ogden (15 Pa. St. 528), 714.
Golding, Davis & Co., Ex parte (13 Ch. Div. 628), 1569.
Goldrich v. Ryan (3 E. D. Smith, 324), 1357.
Goldsborough v. Turner (67 N. C. 403), 1455.
Goldsmith v. Bryant (26 Wis. 33), 543.
Goldstone v. Merchants' Ice & Cold Storage Co. (123 Cal. 625), 164.
Golloher v. Martin (33 Kan. 252), 966.
Gomer v. McPhee (2 Colo. App. 287), 1163.
Gompertz v. Bartlett (2 El. & Bl. 849), 1155, 1208.
Gompertz v. Denton (1 Cr. & M. 207), 1805.
Gooch v. Holmes (41 Me. 423), 331, 1665.
Good v. Singleton (39 Minn. 340), 1433.
Goodal v. Skelton (2 H. Bl. 316), 404, 1485.
Goodell v. Fairbrother (12 R. I. 233), 156, 588, 599.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Goodenow v. Tyler (7 Mass. 36), 1446.
Goodkind v. Gilliam (19 Mont. 385), 624.
Goodland v. LeClair (78 Wis. 176), 314, 331.
Goodloe v. Rogers (10 La. Ann. 631), 1792.
Goodman v. Griffiths (1 H. & N. 574), 438, 448.
Goodman v. Shipley (105 Mich. 439), 138.
Goodman v. Winter (64 Ala. 410), 109.
Goodnow v. Smith (18 Pick. 414), 1420.
Goodrich v. Hubbard (51 Mich. 62), 1709, 1712.
Goodrich v. Tracy (43 Vt. 314), 1422.
Goodrich v. Van Nortwick (43 Ill. 445), 663, 680, 814.
Goodsell v. Myers (3 Wend. 479), 121.
Goodspeed v. South Bend Plow Co. (45 Mich. 237), 1431.
Goodwin's Appeal (117 Pa. St. 514), 1727.
Goodwin v. Clark (65 Me. 280), 1004.
Goodwin v. Cremer (18 Q. B. 757), 1466.
Goodwin v. Follett (25 Vt. 386), 1419, 1420.
Goodwin v. Goodwin (90 Me. 23), 964, 998.
Goodwin v. Massachusetts Loan Ass'n (152 Mass. 189), 875, 924, 932, 1433.
Goodwin v. Railroad Co. (111 Mass. 487), 549.
Goodwin v. Wertheimer (99 N. Y. 149), 928, 929.
Googins v. Gilmore (47 Me. 9), 960.
Gookin v. Graham (5 Humph. 480), 1302, 1305.
Goom v. Appalo (6 B. & C. 117), 468.
Goom v. Jackson (5 Esp. 112), 740.
Gordon v. Irvine (105 Ga. 144), 935.
Gordon v. Nieman (118 N. Y. 152), 812.
Gordon v. Norris (49 N. H. 376), 754.
Gordon v. Parmelee (2 Allen, 212), 936, 938.
Gordon v. Potter (17 Vt. 348), 186.
Gordon v. Ritenour (87 Mo. 54), 150.
Gordon v. Watrous (36 Up. Can. Q. B. 321), 1255, 1377.
Gore v. Gibson (13 Mees. & W. 623), 87.
Gorham v. Holden (79 Me. 317), 569.
Gorman v. Brossard (120 Mich. 611), 328, 382, 383, 416.
Gormerly v. Gymnastic Ass'n (55 Wis. 350), 872.
Goshell v. Archer (2 Ad. & El. 500), 458.
Goslen v. Campbell (88 Me. 450), 612, 624.
Goss v. Dysant (31 Tex. 186), 1794.
Goss Printing Press Co. v. Jordan (171 Pa. St. 474), 565, 600.
Goss v. Lord Nugent (5 B. & Ad. 58), 447, 806.
Goss v. Quinton (3 M. & G. 825), 761.
Gossler v. Eagle Sugar Refinery (103 Mass. 331), 1337.
Gossler v. Schepeler (5 Daly, 476), 1531.
Gottschalk v. Stein (69 Md. 51), 1724, 1730.
Goudy v. Gebhart (1 Ohio St. 262), 947.
Gould v. Blodgett (61 N. H. 115), 175.
Gould v. Bourgeois (51 N. J. L. 361), 1302, 1309.
Gould v. Huntley (73 Cal. 399), 965.
Gould v. Stein (149 Mass. 570), 1275, 1320, 1331, 1334, 1335, 1339, 1392, 1393.
Goulds v. Brophy (42 Minn. 109), 1254, 1349, 1352.
Gove v. Wooster (Lalor's Supl. 30), 199.
Governor, etc. v. Petch (28 Eng. L. & Eq. 470), 226.
Gowen v. Klous (101 Mass. 449), 436.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Gowing v. Knowles (118 Mass. 232), 227, 234.
Grace v. Hale (2 Humph. 27), 131, 132.
Grace v. McKissack (49 Ala. 163), 170.
Gradle v. Kern (109 Ill. 557), 981, 982.
Graff v. Evans (8 Q. B. Div. 373), ——.
Graff v. Fitch (58 Ill. 373), 496, 502, 518, 964, 1199.
Graff v. Foster (67 Mo. 512), 1320.
Graff v. Osborne (56 Kan. 162), 1393, 1808.
Graffenstein v. Epstein (23 Kan. 443), 936, 937.
Grafton v. Cummings (99 U. S. 100), 434.
Gragg v. Martin (12 Allen, 498), 200.
Graham v. Duckwall (8 Bush, 12), 1447.
Graham v. Maitland (6 Abb. Pr. 327), 1692.
Graham v. Musson (5 Bing. N. C. 603), 460.
Graham v. Negus (55 Hun, 440), 1428.
Graham v. Stiles (38 Vt. 578), 868, 935.
Graham v. Thompson (55 Ark. 299), 934.
Graham v. U. S. Saving Inst. (46 Mo. 186), 1461.
Graham v. Van Diemen's Land Co. (11 Exch. 101), 1130.
Grand Ave. Hotel Co. v. Wharton (79 Fed. R. 43), 1349.
Grand Tower Co. v. Phillips (23 Wall. 471), 1690, 1736, 1742.
Granite Roofing Co. v. Casler (82 Mich. 466), 49.
Grant v. Fletcher (5 B. & C. 436), 468.
Grant v. Grant (56 Me. 573), 872.
Grant v. McGrath (56 Conn. 333), 1057.
Grant v. Merchants' Bank (35 Mich. 515), 499, 516, 1129.
Grau v. McVicker (8 Biss. 13), 1090.
Graul v. Strutzel (53 Iowa, 712), 1291.
Graves v. Johnson (156 Mass. 211), 1013, 1018, 1019, 1027.
Graves v. Legg (9 Ex. 709), 654, 861, 1145.
Graves v. Legg (2 Hurl. & N. 210), 1281.
Graves v. Morse (45 Neb. 604), 1374.
Graves v. Safford (41 Ill. App. 659), 1004.
Graves v. Weld (5 B. & Ad. 105), 342.
Gray v. Barton (55 N. Y. 68), 12.
Gray v. Blanchard (8 Pick. 283), 1072.
Gray v. Central R. Co. (11 Hun, 70), 667.
Gray v. Consolidated Ice Machine Co. (103 Ga. 115), 1377, 1402, 1806.
Gray v. Davis (10 N. Y. 285), 360, 380.
Gray v. Herman (75 Wis. 453), 1467.
Gray v. Walton (107 N. Y. 254), 1118, 1124, 1187, 1191.
Graydon v. Patterson (13 Iowa, 256), 1455.
Great Northern Ry. Co. v. Witham (L. R. 9 C. P. 16), 263.
Greaves v. Ashlin (3 Camp. 426), 1748.
Grebert-Borgnis v. Nugent (15 Q. B. Div. 85), 1763, 1766, 1770.
Greely v. Bartlett (1 Greenl. 172), 1446.
Green v. Adams (59 Vt. 602), 970.
Green v. Ansley (92 Ga. 647), 1634.
Green v. Armstrong (1 Denio, 550), 336, 341.
Green v. Ashland Iron Co. (62 Pa. St. 97), 347.
Green v. Ashland Water Co. (101 Wis. 258), 1356, 1359.
Green v. Bateman (2 Woodb. & M. 359), 278.
Green v. Beeson (31 Ind. 7), 191.
Green v. Boston & L. R. Co. (128 Mass. 221), 1743.
Green v. Bryant (2 Ga. 66), 937.
Green v. Collins (3 Cliff. 494), 1013, 1015.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Green v. Green (69 N. Y. 553), 109.
Green v. Merriam (28 Vt. 801), 385, 1198.
Green v. Sperry (16 Vt. 390), 178.
Green v. Stuart (7 Baxt. 418), 834.
Green v. Tanner (8 Metc. 411), 150.
Green v. Van Buskirk (5 Wall. 307), 650.
Green v. Wells (2 Cal. 584), 804.
Green v. Wilding (59 Iowa, 679), 95.
Green Bay Nat. Bank v. Dearborn (115 Mass. 219), 964.
Greene v. Dingley (24 Me. 131), 1132.
Greene v. Godfrey (44 Me. 25), 1053.
Greene v. Lewis (85 Ala. 221), 202, 206, 207, 496, 498, 1659.
Greenbrier Lumber Co. v. Ward (36 W. Va. 573), 1129.
Greenfield's Case (14 Pa. St. 489), 266.
Greenhood v. Keator (9 Ill. App. 183), 1447, 1448.
Greenleaf v. Gallagher (93 Me. 549), 1665.
Greenstine v. Borchard (50 Mich. 434), 1273.
Greenthal v. Lincoln (68 Conn. 384), 966.
Greenvault v. Davis (4 Hill, 643), 1796.
Greenwald v. Metcalf (28 Iowa, 363), 1463.
Greenway v. Gaither (Taney, 227), 1090.
Greenwell v. Nash (13 Nev. 286), 953.
Greenwood v. Burns (50 Mo. 52), 1455.
Greenwood v. Curtis (6 Mass. 358), 1125.
Greenwood v. Law (55 N. J. L. 168), 331.
Greer v. Church (13 Bush, 430), 568, 576, 578, 583, 588, 600.
Greer v. Wright (6 Gratt. 154), 970.
Gregg v. Page Belting Co. (69 N. H. 247), 1337, 1349.
Gregg v. Wells (10 Adol. & El. 90), 170.
Gregory v. Morris (96 U. S. 619), 1484.
Gregory v. Schoenell (55 Ind. 101), 879, 1223.
Gregory v. Wattowa (58 Iowa, 711), 1034.
Gregory v. Wendell (39 Mich. 337), 203, 1031, 1032, 1035, 1036.
Gregory v. Wendell (40 Mich. 432), 709, 1031, 1032, 1033.
Gregson v. Coal Co. (54 S. W. R. 113), 1155.
Gregson v. Rucks (4 Q. B. 737), 468.
Gresham v. Bryan (103 Ala. 629), 714.
Gresham v. Postan (2 Car. & P. 540), 1810.
Greve v. Dunham (60 Iowa, 108), 1592, 1595.
Grey v. Tubbs (43 Cal. 359), 629.
Gribben v. Maxwell (34 Kan. 8), 72, 77.
Grice v. Richardson (3 App. Cas. 319), 1513, 1515.
Grieb v. Cole (60 Mich. 397), 451, 1240, 1353.
Griffeth v. Douglass (73 Me. 532), 202.
Griffeth v. Wells (3 Denio, 226), 1046.
Griffin v. Colver (16 N. Y. 489), 1757, 1760, 1779, 1790.
Griffin v. Gratwick Lumber Co. (97 Mich. 557), 227.
Griffin v. O'Neil (48 Kan. 117), 278.
Griffith v. Field (105 Iowa, 362), 1288.
Griffith v. Strand (19 Wash. 686), 880, 936.
Griffiths v. Perry (1 El. & El. 680), 1513, 1514, 1515, 1516, 1518.
Griffiths v. Sears (112 Pa. St. 523), 1031.
Griffiths Co. v. Humber (2 Q. B. 414), 426, 453.
Griggs v. Day (136 N. Y. 152), 1786.
Grigsby v. Stapleton (94 Mo. 423), 869, 935.
Grimboldby v. Wells (L. R. 10 C. P. 391), 1377, 1402.
Grimes v. Van Vechten (20 Mich. 410), 365.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Grimsley v. Hooker (3 Jones Eq. 4), 960.
Grinnell v. Spike (128 Mass. 25), 1419.
Griswold v. Butler (3 Conn. 227), 69.
Griswold v. Gebbie (126 Pa. St. 353), 875.
Griswold v. Sabin (51 N. H. 167), 875.
Griswold v. Scott (66 Vt. 550), 1190, 1198.
Grist v. Williams (111 N. C. 53), 1631.
Grizewood v. Blane (11 Com. B. 526), 1031.
Groat v. Gile (51 N. Y. 431), 499, 516, 519.
Groetzinger v. Kann (165 Pa. St. 578), 1236.
Groff v. Belche (62 Mo. 400), 508, 512.
Grosh v. Ivanhoe Land Co. (95 Va. 161), 863.
Gross v. Criss (3 Gratt. 262), 1264.
Gross v. Gross (94 Wis. 14), 947.
Gross v. Jordan (83 Mo. 380), 569.
Gross v. Kierski (41 Cal. 111), 1302, 1795.
Grosvenor v. Magill (37 Ill. 239), 1136.
Grosvenor v. Phillips (2 Hill, 147), 752.
Groton v. Waldoborough (11 Me. 306), 1042.
Grout v. Hill (4 Gray, 361), 660, 1551, 1592.
Grove v. Donaldson (15 Pa. St. 128), 1106.
Grover & Baker Sew. Mach. Co. v. Polhemus (34 Mich. 247), 1445.
Groves v. Buck (3 Maule & Sel. 178), 298, 300, 305.
Gruman v. Smith (81 N. Y. 25), 1787.
Grymes v. Blofield (Croke, Eliz. 541), 1466.
Guardians of the Poor v. Petch (10 Exch. 610), 235.
Guckenheimer v. Angevine (81 N. Y. 394), 914, 918.
Guerdon v. Corbett (87 Ill. 272), 1147.
Guernsey v. Lumber Co. (87 Cal. 249), 1391.
Guest v. Diack (29 Nova Scotia, 504), 571.
Guetzkow v. Andrews (92 Wis. 214), 1766, 1767.
Guice v. Sanders (21 La. Ann. 463), 960.
Guilford v. McKinley (61 Ga. 232), 570.
Guilford v. Smith (30 Vt. 49), 1586.
Guilford v. Stacer (53 Ga. 618), 1453.
Guillaume v. Transportation Co. (100 N. Y. 491), 887.
Guillon v. Earnshaw (169 Pa. St. 463), 1638, 1674, 1690.
Gulf, etc. Ry. Co. v. Settegast (79 Tex. 256), 428.
Gulledge v. Slayden-Kirksey Mills (75 Miss. 297), 924.
Gumm v. Tyrie (33 L. J. Q. B. 97), 735, 787.
Gunderson v. Richardson (56 Iowa, 56), 1056.
Gunn v. Blockow, Vaughan & Co. (10 Ch. 491), 1504.
Gunther v. Atwell (19 Md. 157), 1320, 1321.
Gunther v. Ullrich (82 Wis. 222), 875, 922.
Gurney v. Atlantic, etc. Ry. Co. (58 N. Y. 358), 1320, 1391, 1392, 1395.
Gurney v. Collins (64 Mich. 158), 564.
Gurney, In re. Ex parte Hughes (67 L. T., N. S., 598), 1574, 1576.
Gurney v. Womersley (4 El. & Bl. 133), 838, 1849.
Gurrey v. Behrend (3 El. & Bl. 633), 166.
Gustine v. Phillips (38 Mich. 674), 1541.
Guthrie v. Morris (22 Ark. 411), 123.
Guthrie v. Murphy (4 Watts, 80), 127.
Guthrie v. Russell (46 Iowa, 269), 1797.
Gwillim v. Daniell (2 Cromp., M. & R. 61), 1169.
Gwinn v. Simes (61 Mo. 335), 1057, 1058.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1870.

Gwyn v. Richmond & Danville R. R. Co. (85 N. C. 429), 1333.
Haacke v. Knights (76 Md. 429), 1057.
Haak v. Lindermann (64 Pa. St. 499), 580, 600.
Haas v. Myers (111 Ill. 421), 247, 250.
Haase v. Mitchell (58 Ind. 213), 914, 916.
Haase v. Nonnemacher (21 Minn. 486), 1156, 1392.
Hackbarth v. Wollner (88 Wis. 476), 1200.
Hacker v. Monroe (56 Ill. App. 532), 906.
Hadcock v. Osmer (153 N. Y. 604), 875.
Hadley v. Baxendale (9 Exch. 341), 1757, 1760.
Hadley v. Clinton Co. Imp. Co. (13 Ohio St. 502), 1311.
Haenn v. Bleisch (146 Ill. 262), 893.
Hagany v. Herbert (3 Houst. 628), 960.
Hagee v. Grossman (31 Ind. 223), 879.
Hagerman v. Buchanan (45 N. J. Eq. 292), 973.
Haggerty v. Palmer (6 Johns. Ch. 438), 891, 1437.
Hagins v. Combs (102 Ky. 165), 210, 211, 488, 492, 496, 723, 960, 991, 1198.
Hague v. Porter (3 Hill, 141), 738.
Hahn v. Doolittle (18 Wis. 196), 1235, 1255.
Hahn v. Fredericks (30 Mich. 223), 499, 516, 520, 700.
Haight v. McVeagh (69 Ill. 624), 138.
Haille v. Smith (1 B. & P. 563), 788.
Haines v. Pohlmann (25 N. J. Eq. 179), 1453.
Haines v. Tucker (50 N. H. 307), 1092, 1148, 1643, 1682.
Haldeman v. Duncan (51 Pa. St. 66), 714.
Hale v. Brown (11 Ala. 87), 90.
Hale v. Gerrish (8 N. H. 374), 121.
Hale v. Hess (30 Neb. 42), 1690.
Hale v. Huntley (21 Vt. 147), 508, 764.
Hale v. Milwaukee Dock Co. (29 Wis. 482), 1194.
Hale v. Patton (60 N. Y. 233), 1417.
Hale v. Philbrick (42 Iowa, 81), 934.
Hale v. Trout (35 Cal. 229), 1709.
Haley v. Bellamy (137 Mass. 357), 212.
Halff v. Allyn (60 Tex. 278), 1572, 1576, 1590.
Hall v. Aitkin (25 Neb. 360), 1304, 1797.
Hall v. Butterfield (59 N. H. 354), 107, 109.
Hall v. Conder (2 Com. B., N. S., 53), 213, 834, 1301, 1309, 1311.
Hall v. Costello (48 N. H. 176), 1004.
Hall v. Dimond (63 N. H. 565), 1582, 1583.
Hall v. Glass (123 Cal. 500), 202.
Hall v. Green (1 Houst. 546), 755.
Hall v. Harper (17 Ill. 82), 189.
Hall v. Hinks (21 Md. 406), 600.
Hall v. Jones (21 Md. 439), 101.
Hall v. Morrison (92 Ga. 311), 492, 1200.
Hall v. Pillsbury (43 Minn. 33), 26.
Hall v. Plassan (19 La. Ann. 11), 1320.
Hall v. Richardson (16 Md. 396), 775.
Hall v. Stevens (40 Hun, 578), 541.
Hall v. Storrs (7 Wis. 253), 1460.
Hall v. Warren (9 Ves. 605), 73.
Hall & Brown Mach. Co. v. Brown (82 Tex. 469), 603, 658, 1407.
Hallacher v. Henlein (— Tenn. Ch. App. —), 905, 906.
Hallen v. Runder (1 Cr., Mees. & Ros. 266), 333.
Hallenbach v. Cochran (20 Hun, 416), 382.
Hallett v. Novion (14 Johns. 273), 1045.
Hallgarten v. Oldham (135 Mass. 1), 757, 788, 964, 984, 1194.
Halliday v. Hamilton (11 Wall. 564), 51.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Halliday v. Miller (29 W. Va. 424), 955.
Hallock v. Alford (61 Conn. 194), 390.
Hallowell & Augusta Bank v. Howard (13 Mass. 235), 1437.
Halls v. Thompson (1 S. & M. 443), 879.
Halsell v. Musgrave (5 Tex. Civ. App. 476), 931.
Halsey v. Warden (25 Kan. 128), 788.
Halterline v. Rice (62 Barb. 593), 508, 510, 575.
Haltiwanger v. Tanner (103 Ga. 314), 1814.
Ham v. Cerniglia (73 Miss. 290), 569.
Hambrick v. Wilkins (65 Miss. 18), 921.
Hamburger v. Rodman (9 Daly, 93), 1515.
Hamet v. Dundass (4 Pa. St. 178), 970.
Hamet v. Letcher (37 Ohio St. 356), 149, 269, 887.
Hamilton v. Calhoun (2 Watts, 139), 734, 1124.
Hamilton v. Gordon (22 Oreg. 557), 508, 523.
Hamilton v. Insurance Co. (5 Barr, 339), 247.
Hamilton v. Magill (12 L. R. Ir. 186), 1770.
Hamilton v. Russel (1 Cranch, 309), 960.
Hamilton v. Scull (25 Mo. 165), 947.
Hamilton v. Singer Mfg. Co. (54 Ill. 370), 628, 629.
Hamilton v. Terry (11 C. B. 954), 234.
Hamilton-Brown Shoe Co. v. Lyons (6 Tex. Civ. App. 633), 924.
Hamm Brewing Co. v. Young (76 Minn. 246), 1029.
Hammacher v. Wilson (26 Fed. R. 239), 1080.
Hammer v. Schoenfelder (47 Wis. 455), 1773.
Hammett v. Linneman (48 N. Y. 399), 541, 543, 549, 552.
Hammond v. Anderson (1 Bos. & Pul. N. R. 69), 490, 1499.
Hammond v. Bussey (20 Q. B. Div. 79), 1769, 1770.
Hammond v. Pennock (61 N. Y. 145), 918.
Hanauer v. Doane (12 Wall. 342), 1013, 1016, 1024.
Hanauer v. Woodruff (82 U. S. 439), 1024.
Hance v. Boom Co. (70 Mich. 227), 549.
Hancock v. New York L. Ins. Co. (Fed. Cas. No. 6011), 1090.
Hands v. Burton (9 East, 439), 16.
Hands v. Slaney (8 T. R. 578), 132.
Handy v. Globe Pub. Co. (41 Minn. 188), 1003, 1048, 1057.
Handy v. Waldron (19 R. I. 618), 882, 937.
Hanford v. Archer (4 Hill, 271), 960.
Hanger v. Evins (38 Ark. 334), 1254.
Hanks v. Deal (3 McCord, 257), 124.
Hanks v. McKee (2 Littell, 227), 1272, 1345.
Hanna v. Mills (21 Wend. 90), 1664.
Hanover Nat. Bank v. Johnson (90 Ala. 549), 1050.
Hansen v. Baltimore, etc. Co. (86 Fed. R. 832), 942.
Hansen v. Consumers' Steam Heating Co. (73 Iowa, 77), 1148.
Hansen v. Gaar (63 Minn. 94), 1273.
Hansen v. Kirtly (11 Iowa, 565), 1079, 1389.
Hanson v. Buckner (4 Dana, 251), 972.
Hanson v. Busse (45 Ill. 496), 1237, 1320.
Hanson v. Edgerly (29 N. H. 343), 1272.
Hanson v. Hartse (70 Minn. 272), 1356, 1357.
Hanson v. Marsh (40 Minn. 1), 438.
Hanson v. Meyer (6 East, 614), 515, 524, 1437.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hanson v. Rolter (64 Wis. 622), 293. 356, 419.
Hapgood v. Rosenstock (23 Fed. R. 86), 1729.
Hapgood v. Shaw (105 Mass. 276), 1121.
Happy v. Mosher (47 Barb. 501), 755.
Harber v. Moffat Cycle Co. (151 Ill. 84), 1389, 1390.
Hardell v. McClure (2 Pin. 289), 314, 324.
Hardeman v. De Vaughn (49 Ga. 596), 51, 752.
Hardenberg v. Bacon (33 Cal. 356), 347.
Hardenbrook v. Sherwood (72 Ind. 403), 72, 73.
Hardesty v. Newby (28 Mo. 567), 1462.
Harding v. Coburn (12 Metc. 333), 636.
Harding v. Larkin (41 Ill. 413), 1798.
Harding v. Lewenberg (174 Mass. 394), 637, 642.
Harding v. Manard (55 Mo. App. 364), 491, 492.
Harding v. Metz (1 Tenn. Ch. 610), 554.
Harding Paper Co. v. Allen (65 Wis. 576), 1582, 1583.
Hardman v. Booth (1 H. & C. 803), 149, 268, 269, 887.
Hare v. Gibson (32 Ohio St. 33), 184.
Hargous v. Stone (5 N. Y. 73), 1320, 1321, 1340.
Harkey v. Cain (69 Tex. 146), 645.
Harkness v. Russell (118 U. S. 663), 564), 566, 583, 599.
Harlan v. Ely (68 Cal. 522), 1460.
Harlow v. Putnam (124 Mass. 553), 834.
Harman v. Anderson (2 Camp. 243), 380, 1493.
Harman v. Fisher (1 Cowp. 117), 1592.
Harman v. Reeve (18 C. B. 587), 283, 350.
Harmon v. Goetter (87 Ala. 325), 613.
Harmon v. Hawkins (18 Mont. 525), 960.
Harmony v. Bingham (12 N. Y. 99), 1103.
Harp v. Guano Co. (99 Ga. 752), 603.
Harper v. Harper (85 Ky. 160), 948.
Harper v. Harvey (4 W. Va. 539), 1455.
Harper v. People (2 Colo. App. 177), 649.
Harper v. Ross (10 Allen, 332), 40.
Harper v. Young (112 Pa. St. 419), 1031.
Harralson v. Stein (50 Ala. 347), 1162.
Harran v. Foley (62 Wis. 584), 278.
Harrell v. Goodwin (102 N. C. 330), 599, 603.
Harrell v. Miller (35 Miss. 700), 336.
Harriman v. Harriman (12 Gray, 341), 1419.
Harrington v. King (121 Mass. 269), 589, 592.
Harrington v. Mayor (10 Hun, 248), 1169.
Harrington v. Rutherford (38 Fla. 321), 870.
Harrington v. Smith (138 Mass. 92), 1275.
Harris, Ex parte (Law R. 7 Ch. App. 593), 238.
Harris v. Amoskeag Lumber Co. (97 Ga. 465), 228.
Harris v. Harris (23 Gratt. 737), 970.
Harris v. Hart (6 Duer, 606), 1586.
Harris v. Lynn (25 Kan. 281), 1307.
Harris v. McMurray (23 Ind. 9), 881.
Harris v. Pence (93 Iowa, 481), 964.
Harris v. Pratt (17 N. Y. 249), 1546, 1559, 1564, 1579, 1612.
Harris v. Rowland (23 Ala. 644), 1795.
Harris v. Runnels (12 How. 80), 1045, 1046.
Harris v. Smith (3 Serg. & R. 20), 542, 546, 554.
Harris v. Tenney (85 Tex. 254), 1571, 1590, 1595.
Harris v. Tumbridge (83 N. Y. 92), 1034.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Harris v. Waite (51 Vt. 481), 1347.
Harrison v. Bailey (14 S. C. 334), 947.
Harrison v. Fortlage (161 U. S. 57), 654.
Harrison v. Hicks (1 Port. 423), 1467.
Harrison v. Le Gore (109 Iowa, 618), 1453, 1459.
Harrison v. McCormick (89 Cal. 327), 446, 447, 1327.
Harrison v. Otley (101 Iowa, 652), 64.
Harrison v. Ross (44 N. Y. Super. 230), 1451.
Harrod v. Myers (21 Ark. 592), 79.
Harrold v. Barwise (10 Tex. Civ. App. 138), 564.
Harrow Spring Co. v. Whipple Harrow Co. (90 Mich. 147), 1130, 1255, 1791, 1844.
Hart v. Barney, etc. Mfg. Co. (7 Fed. R. 543), 578.
Hart v. Boller (15 Serg. & R. 162), 1423.
Hart v. Burton (7 J. J. Marsh.), 322.
Hart v. Bush (El., Bl. & El. 494), 1181, 1496.
Hart v. Carpenter (24 Conn. 426), 32, 599.
Hart v. Deamer (6 Wend. 497), 69.
Hart v. Manufacturing Co. (7 Fed. R. 543), 650.
Hart v. Mills (15 M. & W. 85), 242, 746, 1158, 1160.
Hart v. Moulton (104 Wis. 349), 904, 906.
Hart v. Prater (1 Jur. 623), 132.
Hart v. Tyler (15 Pick. 171), 388.
Hart v. Woods (7 Blackf. 568), 461.
Hart v. Wright (17 Wend. 267), 1311, 1356, 1357.
Hartford Sorghum Mfg. Co. v. Brush (43 Vt. 528), 667.
Hartford & N. H. R. Co. v. Jackson (24 Conn. 514), 274.
Hartford F. Ins. Co. v. Kirkpatrick (111 Ala. 456), 879.
Harting v. Jockers (136 Ill. 627), 955.
Hartje v. Collins (46 Pa. St. 268), 1081.
Hartley v. Tapley (2 Gray, 565), 200.
Hartlove v. Durham (86 Md. 689), 1107.
Hartman v. Weiland (36 Minn. 223), 974.
Hartshorn v. Williams (31 Ala. 149), 40.
Hartwell v. Kelly (117 Mass. 235), 333.
Harvey v. Duffy (99 Cal. 401), 753.
Harvey v. Grabham (5 A. & E. 61), 447.
Harvey v. Harris (112 Mass. 32), 272, 274.
Harvey v. Merrill (150 Mass. 1), 1031, 1039.
Harvey v. Stevens (43 Vt. 653), 461.
Harvey v. Tama County (63 Iowa, 228), 1467.
Harvey v. Varney (98 Mass. 118), 947.
Harvin v. Weeks (11 Rich. L. 601), 947.
Harwood v. Knapper (50 Mo. 456), 947.
Harworth v. Truby (138 Pa. St. 223), 1374.
Hascall v. Life Ass'n (5 Hun, 151), 451.
Hash v. Lore (88 Va. 716), 599, 603.
Haskell v. Rice (11 Gray, 240), 1515.
Haskins v. Warren (115 Mass. 514), 542, 549, 553, 1121, 1482, 1488, 1670.
Haslack v. Mayers (26 N. J. L. 284), 1162.
Hassard v. Hardison (117 N. C. 60), 205, 1421, 1755.
Hastelow v. Jackson (8 B. & C. 221), 999.
Hastie v. Coutourier (9 Ex. 102), 199, 1430.
Hastings v. Dollarhide (24 Cal. 195), 101.
Hastings v. Lovering (2 Pick. 214), 1334, 1336.
Hatch v. Bayley (12 Cush. 27), 491, 775.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hatch v. Douglass (48 Conn. 116), 203, 1031, 1035.
Hatch v. Fowler (28 Mich. 205), 499, 516.
Hatch v. Hatch (60 Vt. 160), 121.
Hatch v. Lincoln (12 Cush. 31), 775.
Hatch v. McBrien (83 Mich. 159), 42.
Hatch v. Oil Co. (100 U. S. 124), 485, 493, 1124.
Hatcher v. Corner (75 Ga. 728), 1433.
Hatchkin v. Third Nat. Bank (127 N. Y. 329), 906.
Hatfield v. Reynolds (34 Barb. 612), 1453.
Hathaway v. Bennett (10 N. Y. 108), 197.
Hathaway v. Haynes (124 Mass. 311), 792.
Hatstat v. Blakeslee (41 Conn. 301), 984.
Hauck Cloth Co. v. Brothers (61 Mo. App. 381), 603.
Hauser v. Beaty (93 Mich. 499), 955.
Hausman v. Nye (62 Ind. 485), 358, 365, 393.
Havemeyer v. Cunningham (35 Barb. 515), 1740, 1755.
Haven v. Emery (33 N. H. 66), 645.
Haven v. Neal (43 Minn. 315), 877.
Haven v. Wakefield (39 Ill. 509), 1079, 1389.
Havens v. Grand Island L. & F. Co. (41 Neb. 153), 741.
Havey v. Petrie (100 Mich. 190), 941.
Hawes v. Forster (1 Mood. & Rob. 368), 468.
Hawkes v. Dunn (1 Cromp. & Jer. 519), 1530.
Hawkins v. Berry (5 Gilm. 36), 1268.
Hawkins v. Chace (19 Pick. 502), 446, 451, 453, 455, 456.
Hawkins v. Graham (149 Mass. 284), 668.
Hawkins v. Hersey (86 Me. 394), 646.
Hawkins v. Kansas City Hydraulic, etc. Brick Co. (63 Mo. App. 64), 964.
Hawkins v. Pemberton (51 N. Y. 198), 1235, 1237, 1238, 1244, 1334.
Hawley v. Bibb (69 Ala. 52), 1031.
Hawley v. Keeler (53 N. Y. 114), 363, 383, 391, 393, 421, 1097.
Haxall v. Willis (15 Gratt. 434), 524, 529.
Haycraft v. Creasy (2 East, 92), 876, 1223.
Hayden v. Demets (53 N. Y. 426), 485, 493, 542, 1618, 1682.
Hayden v. Frederickson (— Neb. —), 1202.
Hayden v. Reynolds (54 Iowa, 157), 1148.
Hayes v. Colby (65 N. H. 192), 1455.
Hayes v. Nashville (47 U. S. App. 713), 617, 629, 1640, 1680.
Haynes v. Hunsicker (26 Pa. St. 58), 964.
Haynes v. Rudd (102 N. Y. 372), 1000.
Haynie v. Robertson (58 Ala. 37), 692.
Hays v. Currie (3 Sandf. Ch. 585), 1437.
Hays v. Jordan (85 Ga. 741), 569, 570, 629.
Hays v. Midas (104 N. Y. 602), 909.
Hays v. Mouille (14 Pa. St. 48), 1540, 1559, 1571, 1604, 1610.
Hays v. Pittsburgh, etc. Packet Co. (33 Fed. R. 552), 492, 520, 728, 750.
Hays v. Weatherman (14 Ind. 341), 1664.
Hazard v. Day (14 Allen, 487), 1052.
Hazard v. Fiske (83 N. Y. 287), 1194.
Hazard v. Irwin (18 Pick. 95), 875, 1242, 1268.
Hazard v. Loring (10 Cush. 267), 39, 40, 1327.
Hazard v. New England Ins. Co. (1 Sumn. 218), 199.
Hazelton v. Weeks (49 Wis. 661), 639.
Hazelton Boiler Co. v. Fargo Gas & Electric Co. (4 N. Dak. 365), 1242.
Hazlehurst Compress Co. v. Boomer Compress Co. (2 U. S. App. 139), 1251.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Head v. Goodwin (37 Me. 181), 202.
Head v. Miller (45 Minn. 446), 50.
Head v. Tattersall (L. R. 7 Exch. 7), 677, 683, 684, 819.
Headrick v. Brattian (63 Ind. 438), 202.
Heald v. Builders' Ins. Co. (111 Mass. 38), 202.
Heald v. Hendy (89 Cal. 632), 188.
Heard v. James (49 Miss. 236), 639.
Heath v. Randall (4 Cush. 195), 336, 626, 627.
Heath v. Stevens (48 N. H. 251), 109.
Heath v. Van Cott (9 Wis. 516), 947.
Heath v. West (28 N. H. 101), 109, 120.
Heaton v. Nelson (74 Mich. 199), 953.
Hebb's Case (L. R. 4 Eq. 9), 247, 275, 276.
Helden v. Griffin (136 Mass. 229), 874.
Helden v. Roberts (134 Mass. 38), 1162.
Hedges v. Hudson River R. Co. (49 N. Y. 223), 1132.
Hedgley v. Holt (4 C. & P. 104), 1214.
Hedman v. Anderson (6 Neb. 392), 952.
Hedrick v. Strauss (42 Neb. 485), 952.
Heffron v. Armsby (61 Mich. 505), 437, 438.
Hefner v. Haynes (89 Iowa, 616), 823, 1251.
Hege v. Newsome (96 Ind. 426), 1335, 1393.
Hegler v. Eddy (53 Cal. 597), 569, 595.
Heilbroner v. Douglass (45 Tex. 403), 1787.
Heilbronn v. Herzog (33 App. Div. 311), 912.
Heilbronn v. Herzog (165 N. Y. 98), 1411.
Heilbutt v. Hickson (L. R. 7 C. P. 438), 730, 1212, 1329, 1346, 1377.
Heilman v. Pruyn (122 Mass. 301), 1828.
Heilman Milling Co. v. Hotaling (—— Ky. ——), 1820.
Heinberg v. Cannon (36 Fla. 601), 1196.
Heinbockle v. Zugbaum (5 Mont. 344), 599.
Heine v. Anderson (2 Duer, 318), 491.
Heinekey v. Earle (28 L. J. Q. B. 79), 1591.
Heineman v. Newman (55 Ga. 262), 947.
Heintz v. Burkhard (29 Oreg. 55), 309.
Heinz v. Transfer Co. (82 Mo. 233), 1592.
Heinze v. Marx (4 Tex. Civ. App. 599), 909.
Heiser v. Mears (120 N. C. 443), 1690, 1701.
Heiskell v. Bank (89 Pa. St. 155), 792.
Heisley v. Swanstrom (40 Minn. 196), 473.
Heister v. Loomis (47 Mich. 16), 1780.
Heizer v. Kingsland Mfg. Co. (110 Mo. 605), 878.
Hellams v. Abercrombie (15 S. C. 110), 1052.
Helms v. Green (105 N. C. 251), 953.
Helshaw v. Langley (11 L. J. Ch., N. S., 17), 451.
Helyear v. Hawke (5 Esp. 72), 1294.
Hemmer v. Cooper (8 Allen, 334), 937.
Hemphill v. Miller (75 Ill. App. 488), 918.
Henderson v. Barnewell (1 Y. & J. 387), 457.
Henderson v. Gibbs (39 Kan. 679), 924.
Henderson v. Hart (122 Cal. 332), 964.
Henderson v. Hoke (3 Dev. L. 12), 975.
Henderson v. Hunton (26 Gratt. 926), 978.
Henderson v. Lacon (L. R. 5 Eq. 249), 910.
Henderson v. Waggoner (2 Lea, 133), 1013, 1025.
Hendricks v. Mount (2 South. 738), 947.
Hendrickson v. Back (74 Minn. 90), 1794.
Hendry v. Benlisa (37 Fla. 609), 1421.
Hendy v. Dinkerhoff (57 Cal. 3), 645.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hening v. Powell (33 Mo. 468), 1081, 1189.
Henkel v. Greene (125 N. C. 489), 603.
Henkle v. Smith (21 Ill. 238), 1129, 1130.
Henline v. Hall (4 Ind. 189), 492.
Henry v. Conley (48 Ark. 267), 1433.
Henry v. True (23 Ark. 417), 74, 77.
Henry v. Patterson (57 Pa. St. 346), 32, 580.
Henry v. Ritenour (31 Ind. 136), 65, 90, 136.
Henry v. Root (33 N. Y. 526), 121.
Henshaw v. Robins (9 Metc. 83), 1235, 1275, 1334.
Henthorn v. Fraser (2 Ch. 27), 248, 258.
Hentz v. Jewell (20 Fed. R. 592), 1039.
Hentz v. Miller (94 N. Y. 64), 149.
Hepner v. Haynes (89 Iowa, 616), 1807.
Herman v. Haffenegger (54 Cal. 161), 914.
Herndon v. Kimball (7 Ga. 432), 977.
Herndon v. Reed (82 Tex. 647), 947.
Herrick v. Carter (56 Barb. 41), 14.
Herring v. Cannon (21 S. C. 212), 571, 599, 603.
Herring v. Hottendorf (74 N. C. 588), 1456.
Herring v. Skaggs (62 Ala. 180), 1281, 1282, 1292.
Herring v. Wickham (29 Gratt. 628), 955.
Herron v. Dibrell (87 Va. 289), 1235, 1242.
Hersey v. Benedict (15 Hun, 282), 909, 910.
Hershey Lumber Co. v. St. Paul Sash Co. (66 Minn. 449), 358.
Hersom v. Henderson (21 N. H. 224), 1255.
Hervey v. Dimond (67 N. H. 342), 588.
Hervey v. Locomotive Works (93 U. S. 664), 46, 569, 649, 650.
Heryford v. Davis (102 U. S. 235), 20, 46, 49, 568, 569, 574, 583, 619, 650.
Herzog v. Purdy (119 Cal. 99), 1150, 1163, 1165, 1401.
Heseltine v. Siggers (1 Ex. 856), 329.
Hess, Geo. H. Co. v. Dawson (149 Ill. 138), 1147.
Hesseltine v. Stockwell (30 Me. 237), 642.
Heugh v. Railway Co. (L. R. 5 Exch. 51), 887.
Hewes v. Jordan (39 Md. 472), 367, 369.
Hewett v. Griswold (43 Ill. App. 43), 960, 964.
Hewison v. Guthrie (2 Bing. N. C. 755), 1481.
Hewson Supply Co. v. Minn. Brick Co. (55 Minn. 530), 1736.
Hexter v. Bast (125 Pa. St. 52), 875, 932, 1224, 1237.
Heyman v. Flewker (13 Com. B., N. S., 519), 169.
Heyman v. Neale (2 Camp. 337), 468.
Heysham v. Dethre (89 Pa. St. 506), 333.
Heywood v. Heywood (42 Me. 229), 1440.
Heyworth v. Knight (17 C. B., N. S., 298), 468.
Hiatt v. Twomey (1 Dev. & Bat. Eq. 315), 834.
Hibblewhite v. McMorine (5 M. & W. 462), 203.
Hickey v. Thompson (52 Ark. 234), 138.
Hickman v. Cantrell (9 Yerg. 172), 688.
Hickman v. Dill (39 Mo. App. 246), 1304, 1305, 1797.
Hickman v. Haynes (L. R. 10 C. P. 598), 806, 1151, 1153, 1691, 1749.
Hickman v. Richburg (122 Ala. 638), 619, 624.
Hickman v. Shimp (109 Pa. St. 16), 659, 660, 1384.
Hickman v. Trout (83 Va. 478), 953.
Hicks v. Smith (77 Wis. 146), 336.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hicks v. Whitmore (12 Wend. 548), 461.
Higgins v. Delaware, L. & W. R. Co. (60 N. Y. 553), 1138.
Higgins v. Kusterer (41 Mich. 318), 346.
Higgins v. Lodge (68 Md. 229), 953.
Higgins v. Moore (34 N. Y. 417), 1446, 1447.
Higgins v. Murray (73 N. Y. 252), 305, 1184, 1187.
Higgins v. Senior (8 M. & W. 834), 447, 455.
Higgons v. Burton (26 L. J. Exch. 342), 149, 269, 887.
Higgs v. Thrale (Oliphant, 71), 1270.
High v. Berrett (148 Pa. St. 261), 1843.
Highley v. Barron (49 Mo. 103), 109.
Hight v. Bacon (126 Mass. 10), 1214, 1311, 1314, 1334, 1344, 1392.
Hight v. Harris (56 Ark. 98), 984, 991.
Hight v. Ripley (19 Mo. 137), 311.
Hildreth v. O'Brien (10 Allen, 104), 40, 1255.
Hill v. Ahern (135 Mass. 158), 953.
Hill v. Anderson (5 Smedes & M. 216), 110.
Hill v. Arbon (31 L. T. 125), 132.
Hill v. Blake (97 N. Y. 216), 446, 473, 652, 653, 1139, 1145.
Hill v. Bowman (35 Mich. 191), 970.
Hill v. Freeman (3 Cush. 257), 546.
Hill v. Gray (1 Stark. 434), 869.
Hill v. Hill (113 Mass. 103), 336, 1131.
Hill v. McKay (94 Cal. 5), 1642.
Hill v. North (34 Vt. 604), 1272.
Hill v. Nutter (82 Me. 199), 599, 603.
Hill v. Rewee (11 Metc. 268), 831, 839, 1846, 1850.
Hill v. Smith (1 Iowa, 70), 1051.
Hill v. Smith (32 Vt. 433), 1736, 1741, 1787.
Hill v. Spear (50 N. H. 253), 739, 1013, 1027.
Hill v. Townsend (69 Ala. 286), 569.
Hiller v. Ellis (72 Miss. 701), 879, 895, 898.
Hillestad v. Hostetter (46 Minn. 393), 1122, 1188.
Hilliard v. Weeks (137 Mass. 304), 328.
Hillman v. Wilcox (30 Me. 170), 1810.
Hills v. Bannister (8 Cow. 32), 1807.
Hills v. Laming (9 Exch. 256), 834.
Hills v. Lynch (3 Robt. 42), 746, 1182.
Hills v. Rix (43 Minn. 543), 446.
Hillyer v. Bennett (3 Edw. Ch. 222), 109.
Hilton v. Eckersley (6 El. & Bl. 47), 208.
Hilton v. Shepherd (92 Me. 160), 121.
Hilton v. Tucker (39 Ch. D. 669), 1197.
Himes v. Kiehl (154 Pa. St. 190), 1807.
Hinchman v. Lincoln (124 U. S. 38), 358, 369, 373, 376, 382, 395.
Hinchman v. Point Defiance Ry. Co. (14 Wash. 349), 624.
Hinchman v. Weeks (85 Mich. 535), 895.
Hinckley v. Pittsburgh Steel Co. (121 U. S. 264), 1081, 1097, 1702, 1704, 1705.
Hinde v. Liddell (L. R. 10 Q. B. 265), 1768, 1770.
Hinde v. Whitehouse (7 East, 558), 369, 426, 461, 483, 484.
Hinds v. Chamberlain (6 N. H. 225), 1004.
Hinds v. Kellogg (13 N. Y. Supp. 922), 305.
Hine v. Manhattan R. Co. (132 N. Y. 477), 936.
Hine v. Roberts (48 Conn. 267), 569, 614, 620, 625, 629.
Hinely v. Margaritz (3 Pa. St. 428), 102.
Hineman v. Matthews (138 Pa. St. 204), 638.
Hinton v. Locke (5 Hill, 437), 1264.
Hirchfield v. Waldron (83 Mich. 116), 138.
Hires v. Hurff (39 N. J. L. 4), 711.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hirsch v. Steele (10 Utah, 18), 564, 588, 597.
Hirschmann v. Iron Range R. R. Co. (97 Mich. 384), 188.
Hirschorn v. Canney (98 Mass. 149), 546, 554, 599.
Hirshfield v. Waldron (54 Mich. 649), 1444, 1445.
Hirth v. Graham (50 Ohio St. 57), 336.
Hissam v. Parrish (41 W. Va. 686), 1718.
Hitchcock v. Galveston (3 Woods, 287), 1831.
Hoadly v. House (32 Vt. 179), 1805.
Hoadly v. McLaine (10 Bing. 482), 207, 218, 438.
Hoagland v. Hall (38 N. J. L. 351), 1309.
Hoare v. Rennie (5 H. & N. 19), 1141, 1145.
Hobart v. Littlefield (13 R. I. 341), 736, 739, 740, 741, 742, 750, 779, 788, 1181.
Hobart v. Young (63 Vt. 363), 1235, 1242, 1248, 1255, 1268.
Hobbs v. Carr (127 Mass. 532), 964.
Hobbs v. Massasoit Whip Co. (158 Mass. 194), 1374, 1380.
Hobbs v. Parker (31 Me. 143), 880.
Hobson v. Garringe (1 Ch. 182), 646.
Hochster v. De la Tour (2 El. & Bl. 678), 1089, 1090.
Hockersmith v. Hanley (29 Oreg. 27), 1774.
Hocking v. Hamilton (158 Pa. St. 107), 1089, 1090, 1130.
Hodge v. Tufts (115 Ala. 366), 816, 1395, 1805, 1844.
Hodgeden v. Hubbard (18 Vt. 504), 907.
Hodges v. Insurance Co. (4 Seld. 419), 40.
Hodges v. Kimball (49 Iowa, 577), 51, 752.
Hodges v. Hurd (47 Ill. 363), 964.
Hodges v. Kowing (58 Conn. 12), 449.
Hodges v. Wilkinson (111 N. C. 56), 1304.
Hodgson v. Barrett (33 Ohio St. 63), 543, 555.
Hodgson v. Davies (2 Camp. 530), 468, 470.
Hodgson v. Le Bret (1 Camp. 233), 964.
Hodgson v. Loy (7 T. R. 440), 1526, 1577.
Hodgson v. Temple (5 Taunt. 181), 1012.
Hodson v. Warner (60 Ind. 214), 599.
Hoe v. Sanborn (21 N. Y. 552), 869, 1317, 1346, 1349, 1810.
Hoffman v. Chamberlain (40 N. J. Eq. 663), 1794.
Hoffman v. Culver (7 Ill. App. 450), 524, 535.
Hoffman v. Dixon (105 Wis. 315), 1334, 1354.
Hoffman v. Gallaher (6 Daly, 42), 666.
Hoffman v. Junk (51 Wis. 613), 970.
Hoffman v. King (58 Wis. 314), 1158.
Hoffman v. Noble (6 Metc. 68), 148.
Hoffman v. Oates (77 Ga. 701), 1311.
Hoffman v. Strohecker (7 Watts, 86), 924.
Hoffner v. Clark (5 Whart. 545), 966.
Hogan v. Shorb (24 Wend. 458), 1452.
Hogg v. Smith (1 Taunt. 347), 1461.
Hogins v. Plymton (11 Pick. 97), 1245, 1327, 1334.
Hogue v. Mackey (44 Kan. 277), 278.
Hoit v. Underhill (10 N. H. 220), 121.
Holbrook v. Armstrong (10 Me. 31), 678.
Holbrook v. Connor (60 Me. 578), 937.
Holbrook v. Oberne (56 Iowa, 324), 179.
Holbrook v. Vose (6 Bosw. 76), 1586.
Holbrook v. Wight (24 Wend. 169), 51, 752, 928.
Holbrook v. Zinc Co. (57 N. Y. 616), 162.

References are to sections: Vol. I, §§ 1–797; Vol II, §§ 798–1850.

Holcomb v. Noble (69 Mich. 396), 803, 875.
Holcombe v. Ehrmantraut (46 Minn. 397), 953.
Holden v. Upton (134 Mass. 177), 1046.
Holden Steam Mill v. Westervelt (67 Me. 446), 1162.
Holdom v. Ayer (110 Ill. 448), 875.
Holland v. Adams (103 Ga. 610), 603.
Holland v. Barnes (53 Ala. 83), 90.
Holland v. Rea (48 Mich. 218), 1168, 1634, 1636, 1682.
Holland v. Swain (94 Ill. 154), 148.
Holliday v. Marshall (7 Johns. 211), 213.
Holliday v. Morgan (1 E. & E. 1), 1270.
Holliday v. McKinne (22 Fla. 153), 960.
Hollingsworth v. Napier (3 Cai. 182), 380, 987.
Hollingsworth v. Swedenborg (49 Ind. 378), 186.
Hollins v. Fowler (L. R. 7 Q. B. 616), 269.
Holliway v. Holliway (77 Mo. 392), 948.
Holloway v. Griffith (32 Iowa, 409), 1089.
Holloway v. Jacoby (120 Pa. St. 583), 1236, 1335, 1340, 1393, 1395, 1844.
Holly Mfg. Co. v. New Chester Water Co. (48 Fed. R. 879), 646.
Holman v. Dord (12 Barb. 336), 1810.
Holman v. Johnson (1 Cowp. 341), 995, 997.
Holme v. Guppy (3 M. & W. 387), 1106.
Holmes v. Bailey (92 Pa. St. 57), 792, 1566.
Holmes v. Blogg (8 Taunt. 508), 109.
Holmes v. Briggs (131 Pa. St. 233), 1425.
Holmes v. Evans (48 Miss. 247), 437.
Holmes v. German Bank (87 Pa. St. 525), 792.
Holmes v. Gregg (66 N. H. 621), 1375, 1378.
Holmes v. Rice (45 Mich. 142), 95, 97.
Holmes v. Tyson (147 Pa. St. 305), 1225, 1242, 1244, 1247, 1268.
Holroyd v. Marshall (10 H. L. Cas. 191), 202.
Holt v. Holt (57 Mo. App. 272), 342.
Holt v. Knowlton (86 Me. 456), 603, 605.
Holt v. O'Brien (15 Gray, 311), 1004.
Holt v. Pie (120 Pa. St. 425), 1236, 1375, 1377.
Holt v. Ward Clarencieux (2 Strange, 937), 97.
Holt Mfg. Co. v. Ewing (109 Cal. 353), 619.
Holton v. Noble (83 Cal. 7), 884, 936.
Holsinger v. Nat. etc. Bank (6 Abb. Pr., N. S., 292), 1461.
Holz v. Peterson (98 Iowa, 741), 1124.
Home Lightning Rod Co. v. Neff (60 Iowa, 138), 1320.
Homer v. Dorr (10 Mass. 26), 1264.
Homes v. Crane (2 Pick. 607), 380.
Honck v. Muller (7 Q. B. D. 92), 1141, 1145.
Hone v. Ammons (14 Ill. 29), 1043.
Honeyman v. Marryatt (6 H. L. C. 112), 228.
Hooban v. Bidwell (16 Ohio, 509), 483.
Hoock v. Bowman (42 Neb. 80), 875.
Hood v. Bloch (29 W. Va. 244), 499, 1213, 1311, 1340.
Hood v. Fahnestock (8 Watts, 489), 977.
Hood v. Manhatten Ins. Co. (11 N. Y. 532), 761.
Hood v. Railroad Co. (22 Conn. 1), 141.
Hoofsmith v. Cope (6 Whart. 53), 963.
Hooper v. Story (155 N. Y. 171), 1819, 1844.
Hoopes v. Strasburger (37 Md. 390), 1423, 1427, 1431.
Hooser v. Hunt (65 Wis. 71), 953.
Hoot v. Spade (20 Ind. 326), 1794.
Hooven, etc. Co. v. Burdette (153 Ill. 672), 603, 604.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hoover v. Maher (51 Minn. 269), 746.
Hoover v. Peters (18 Mich. 51), 1356, 1357.
Hoover v. Tibbits (13 Wis. 79), 1579, 1580. 1586.
Hope Lumber Co. v. Hardware Co. (53 Ark. 196), 775, 964, 1181.
Hopewell Mills v. Taunton Savings Bank (150 Mass. 519), 646.
Hopkins v. Appleby (1 Stark. 477), 908.
Hopkins v. Bishop (91 Mich. 328), 960.
Hopkins v. Grinnell (28 Barb. 533), 1302.
Hopkins v. Hitchcock (14 C. B. 65), 1333.
Hopkins v. Maxwell (91 Me. 247), 599, 603.
Hopkins v. Stefan (77 Wis. 45), 1058.
Hopkins v. Tanqueray (15 Com. B. 130), 859, 1225, 1247, 1311.
Hopper v. Haines (71 Md. 64), 1786.
Hoppy v. Mosher (48 N. Y. 313), 1428.
Hopson v. Boyd (6 B. Mon. 296), 69.
Horbach v. Hill (112 U. S. 144), 973.
Horn v. Indianapolis Nat. Bank (125 Ind. 381), 646.
Horn v. Water Co. (13 Cal. 62), 973.
Horncastle v. Farron (3 B. & Ald. 497), 1481.
Horne v. Midland Ry. Co. (L. R. 7 C. P. 583), 1760, 1770, 1791.
Horne v. Walton (117 Ill. 130), 1843.
Horner v. Parkhurst (71 Md. 110), 1238, 1311.
Horr v. Barker (6 Cal. 489), 711.
Horr v. Barker (8 Cal. 603), 708.
Horr v. Barker (11 Cal. 393), 702.
Horton v. Buffington (105 Mass. 399), 1053.
Horton v. Green (66 N. C. 596), 1235, 1240.
Horton v. McCarty (53 Md. 394), 461.
Hoskins v. Johnson (5 Sneed, 469), 1448, 1449.
Hosmer v. Wilson (7 Mich. 294), 1089, 1090, 1091, 1092, 1093, 1106, 1701, 1702.
Hostetter v. Auman (119 Ind. 7), 336.
Hotchkiss v. Fortson (7 Yerg. 67), 86, 90.
Hotchkiss v. Higgins (52 Conn. 205), 677, 678.
Hotchkiss v. Hunt (49 Me. 213), 809, 964.
Hotham v. East India Co. (1 T. R. 638), 1106.
Houdlette v. Tallman (14 Mo. 400), 714.
Hough v. Dickinson (58 Mich. 89), 953.
Houghtaling v. Ball (19 Mo. 84), 397.
Houghtaling v. Hills (59 Iowa, 287), 906.
Houghton v. Carpenter (40 Vt. 588), 1237.
Houghwort v. Boisaubin (18 N. J. Eq. 315), 1136.
Hoult v. Baldwin (67 Cal. 610), 1346.
House v. Alexander (105 Ind. 109), 98, 107, 116, 117, 132.
House v. Beak (141 Ill. 290), 676, 682.
House v. Fort (4 Blackf. 293), 862, 1229, 1237, 1242, 1268, 1810.
Household F. Ins. Co. v. Grant (4 Ex. Div. 216), 247, 250, 258.
Houser & Haines Mfg. Co. v. Hargrove (129 Cal. 90), 548, 599.
Houston v. Cook (153 Pa. St. 43), 942.
Houston, etc. Co. v. Mitchell (38 Tex. 85), 263.
Hovey v. Chase (52 Me. 304), 64, 72.
Hovey v. Gow (81 Mich. 314), 588.
Hovey v. Hobson (53 Me. 451), 72, 77, 79.
Howard v. Borden (13 Allen, 299), 373.
Howard v. Daly (61 N. Y. 362), 1089.
Howard v. Dwight (8 S. Dak. 398), 964.
Howard v. Emerson (110 Mass. 320), 1356, 1357.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Howard v. Harris (8 Allen, 297), 16, 297.
Howard v. Hoey (23 Wend. 350), 1340.
Howard v. Sheward (L. R. 2 C. P. 148), 1294.
Howard v. Simpkins (70 Ga. 322), 110, 132.
Howard v. Smedley (140 Pa. St. 81), 668.
Howard v. Wilmington R. R. Co. (1 Gill, 311), 1106.
Howatt v. Davis (5 Munf. 34), 1603.
Howe v. Combs (38 S. W. R. 1052), 887.
Howe v. Hayward (108 Mass. 54), 404, 407.
Howe v. Huntington (15 Me. 350), 132.
Howe v. Johnson (117 Cal. 37), 964.
Howe v. Palmer (3 B. & Ald. 321), 307.
Howe v. Ward (4 Me. 195), 970, 973.
Howe v. Waysman (12 Mo. 169), 977.
Howe Mach. Co. v. Ballweg (89 Ill. 318), 1446.
Howe Mach. Co. v. Bryson (44 Iowa, 159), 1776, 1831.
Howe Mach. Co. v. Willie (85 Ill. 333), 837, 839, 1850.
Howell v. Berger (19 N. Y. Misc. 315), 925.
Howell v. Boudar (95 Va. 815), 49.
Howell v. Coupland (L. R. 9 Q. B. 462), 1100, 1101, 1103.
Howell v. Pugh (27 Kan. 702), 702.
Hoyle v. Southern Saw Works (105 Ga. 123), 932.
Hoys v. Tuttle (8 Ark. 124), 1417.
Hoyt v. Casey (114 Mass. 397), 126, 127, 129, 132.
Hoyt v. Insurance Co. (26 Hun, 416), 711.
Hoyt v. Weiss (10 Tex. Civ. App. 462), 603.
Hoyt v. Wilkinson (57 Vt. 404), 107.
Hubbard v. Bliss (12 Allen, 590), 592, 1302.
Hubbard v. George (49 Ill. 275), 1398.
Hubbard v. Marshall (50 Wis. 322), 1255.
Hubbard v. Moore (24 La. Ann. 591), 1022.
Hubbard v. Tenbrook (124 Pa. St. 291), 188.
Hubbell v. Flint (13 Gray, 277), 1019, 1027.
Hubbell v. Meigs (50 N. Y. 480), 910.
Huber v. Guggenheim (89 Fed. R. 598), 872, 900, 934.
Huddleston v. Briscoe (11 Ves. 583), 228.
Hudnall v. Paine (39 Fla. 67), 599, 603.
Hudnal v. Wilder (4 McCord, 294), 945, 947.
Hudnut v. Weir (100 Ind. 501), 411.
Hudson v. Bauer Grocery Co. (105 Ala. 200), 892, 901, 923.
Hudson v. Germaine Fruit Co. (95 Ala. 621), 1375, 1377.
Hudson v. King (23 Ill. App. 118), 139.
Hudson v. Roos (76 Mich. 173), 1387.
Hudson v. Swan (83 N. Y. 552), 1502.
Hudson v. Weir (29 Ala. 294), 331.
Hudson Furniture Co. v. Freed Furn. Co. (10 Utah, 31), 365.
Hudson Iron Co. v. Alger (54 N. Y. 173), 18.
Huebler v. Smith (62 Conn. 186), 951, 982, 984.
Huff v. Hall (56 Mich. 456), 13.
Huff v. McCauley (53 Pa. St. 206), 336.
Hughes v. Bray (60 Cal. 284), 1320.
Hughes v. Jones (116 N. Y. 61), 69, 70, 71.
Hughes v. Kelly (40 Conn. 148), 599, 628.
Hughes v. Robertson (1 T. B. Mon. 215), 869, 935.
Hughes v. Winship Machine Co. (78 Ga. 793), 892.
Huguley v. Morris (65 Ga. 666), 1281.
Hugus v. Robinson (24 Pa. St. 9), 960, 966, 988.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hull v. Caldwell (3 S. Dak. 451), 1795.
Hull v. Connolly (3 McCord, 6), 127, 129.
Hull v. Ruggles (56 N. Y. 424), 1019, 1027.
Hull v. Sigsworth (48 Conn. 258), 964.
Hull v. South (109 Ind. 315), 74, 76, 79.
Hultz v. Gibbs (66 Pa. St. 360), 184.
Humaston v. Telegraph Co. (20 Wall. 20), 213, 674.
Humbert v. Larson (99 Iowa, 275), 942.
Humble v. Hunter (12 Q. B. 310), 267.
Humble v. Mitchell (11 A. & E. 205), 329.
Humphrey v. Haskell (7 Allen, 497), 900.
Humphrey v. Merriam (32 Minn. 197), 879.
Humphreys v. Comline (8 Blackf. 516), 1314, 1356, 1357.
Hundley v. Webb (3 J. J. Marsh. 644), 960.
Hunt v. Bay State Iron Co. (97 Mass. 279), 646.
Hunt v. Boyd (2 La. 109), 1424.
Hunt v. Hayes (64 Vt. 89), 184.
Hunt v. Hecht (8 Exch. 814), 369.
Hunt v. Peake (5 Cow. 475), 97.
Hunt v. Sackett (31 Mich. 18), 836, 1302, 1306. 1794.
Hunt v. Thurman (15 Vt. 366), 1189.
Hunt v. Wyman (100 Mass. 198), 658, 660, 670, 676, 1402.
Hunter v. Agnew (1 Fox & S. 15), 124.
Hunter v. Daniel (4 Hare, 420), 1073.
Hunter v. Giddings (97 Mass. 41), 455.
Hunter v. Jameson (6 Ired. 252), 1281.
Hunter v. Moul (98 Pa. St. 13), 1425.
Hunter v. Wetsell (57 N. Y. 375), 419.
Hunter v. Wetsell (84 N. Y. 549), 412, 420, 1127, 1130. 1677.
Huntington v. Chisholm (61 Ga. 270), 714.
Huntington v. Hall (36 Me. 501), 1302.
Huntington v. Knox (7 Cush. 371), 268, 455.
Huntington v. Lombard (— Wash. —), 1237, 1844.
Huntington, etc. Coal Co. v. English (86 Pa. St. 247), 1787.
Hurd v. Bickford (85 Me. 217), 924.
Hurd v. Fleming (34 Vt. 169), 613.
Hurff v. Hires (40 N. J. L. 581), 702, 705, 708, 711.
Hurley v. Brown (98 Mass. 545), 437.
Hurley v. Watson (68 Mich. 531), 1455.
Hurry v. Mangles (1 Campb. 452), 1501, 1513.
Hurst v. Bell (72 Ala. 336), 202.
Huschle v. Morris (131 Ill. 587), 981.
Hussey v. Horne-Payne (8 Ch. Div. 670), 228.
Hussey v. Horne-Payne (4 App. Cas. 311), 448.
Husted v. Craig (36 N. Y. 221), 1083.
Husted v. Ingraham (75 N. Y. 251), 1482.
Huston v. Cantril (11 Leigh, 136), 955.
Huston v. Plato (3 Colo. 402), 1272.
Hutcheson v. Blakeman (3 Met. 80), 247.
Hutchings v. Munger (41 N. Y. 155), 606, 610, 628, 1458.
Hutchings v. Nunes (1 Moore's P. C., N. S., 243), 1537.
Hutchins v. Gilchrist (23 Vt. 82), 964.
Hutchins v. Olcutt (4 Vt. 549), 1424.
Hutchins v. Weldin (114 Ind. 80), 1026.
Hutchinson v. Bowker (5 M. & W. 535), 227, 228.
Hutchinson v. Brown (1 Clarke Ch. 408), 87.
Hutchinson v. Commonwealth (82 Pa. St. 472), 26, 702, 1158.
Hutchinson v. First Nat. Bank (133 Ind. 271), 973.
Hutchinson v. Ford (9 Bush, 318), 199, 200, 202.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Hutchinson v. Hunter (7 Barr, 140), 702, 714.
Hutchinson v. Kelly (1 Rob. 123), 974.
Hutchinson v. Sandt (4 Rawle, 234), 71.
Hutchinson Mfg. Co. v. Pinch (107 Mich. 12), 1255.
Huthmacher v. Harris (38 Pa. St. 491), 273, 274.
Huthmacher v. Lowman (66 Ill. App. 448), 905.
Hutton v. Lippert (8 App. Cas. 304), 46, 49.
Hutton v. Moore (26 Ark. 382), 213, 674.
Huyett & Smith Mfg. Co. v. Gray (124 N. C. 322), 1335, 1817.
Hyatt v. Boyle (5 G. & J. 110), 1311, 1312, 1323, 1337.
Hyde v. Davis (Oliphant, 453), 1270.
Hyde v. Ellery (18 Md. 496), 524.
Hyde v. Woods (94 U. S. 523), 197.
Hyde v. Wrench (3 Beav. 334), 229, 230.
Hydraulic Eng. Co. v. McHaffie (4 Q. B. Div. 670), 1129, 1134, 1763, 1770.
Hyer v. Hyatt (3 Cranch, 276), 122.
Hyland v. Bohn Mfg. Co. (92 Wis. 157), 628.
Hyland v. Sherman (2 E. D. Smith, 234), 1356, 1357.
Hyman v. Cain (3 Jones, 111), 122, 123.
Hynds v. Hays (25 Ind. 31), 1004.
Iasigi v. Brown (17 How. 183), 878.
Iasigi v. Rosenstein (65 Hun, 591), 1182.
Ide v. Leiser (10 Mont. 5), 449.
Ide v. Stanton (15 Vt. 685), 293, 425, 438.
Illinois Land Co. v. Bonner (75 Ill. 315), 97.
Illinois Linen Co. v. Hough (91 Ill. 63), 207.
Ilsley v. Stubbs (9 Mass. 65), 1548.
Imhoff v. Whitmer (7 Casey, 243), 69.
Imperial Bank v. Dock Co. (5 Ch. Div. 195), 1535.
Imperial Land Co., In re (L. R. 7 Ch. App. 587), 247.
Inchbald v. Western Plantation Co. (17 Com. B., N. S., 733), 213, 1097.
Indiana Mfg. Co. v. Hayes (155 Pa. St. 160), 1374.
Indianapolis Co. v. Wilcox (59 Ind. 429), 107, 109, 116.
Indianapolis, etc. Ry. Co. v. Maguire (62 Ind. 140), 714.
Industrial Works v. Mitchell (114 Mich. 29), 1071, 1079, 1389, 1709, 1829.
Ingalls v. Herrick (108 Mass. 351), 960, 964, 965.
Ingalls v. Miller (121 Ind. 188), 883, 1841.
Inge v. Bond (3 Hawks, 101), 1242, 1268.
Inglebright v. Hammond (19 Ohio, 337), 21, 22, 708.
Ingledew v. Douglas (2 Stark. 36), 124.
Inglis v. Usherwood (1 East, 515), 1526, 1548, 1549.
Ingraham v. Union Ry. Co. (19 R. I. 356), 1240, 1248.
Ingraham v. Wheeler (6 Conn. 277), 963.
Ingram v. Rankin (47 Wis. 406), 1786, 1787.
Ingram v. Wackernagle (83 Iowa, 82), 1636, 1638, 1643.
Inslee v. Lane (57 N. H. 454), 1528, 1540, 1571, 1579, 1588, 1595.
Insurance Co. v. Armstrong (117 U. S. 591), 905.
Insurance Co. v. De Wolf (2 Cow. 105), 543.
Insurance Co. v. Wright (1 Wall. 456), 1264.
International, etc. R. Co. v. Nicholson (61 Tex. 550), 1743.
International Pavement Co. v. Smith (17 Mo. App. 264), 1259.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Ireland v. Johnson (18 Abb. Pr. 329), 413.
Ireland v. Livingstone (L. R. 2 Q. B. 99), 1158.
Irish v. Pauley (116 Cal. xvi), 1129.
Iron Cliffs Co. v. Buhl (42 Mich. 86), 703, 1158.
Irons v. Kentner (51 Iowa, 88), 20, 24, 25.
Iroquois Furnace Co. v. Wilkin Mfg. Co. (181 Ill. 582), 1351, 1395.
Irvine v. Stone (6 Cush. 508), 350.
Irwin v. Thompson (27 Kan. 643), 1255, 1308.
Irwin v. Williar (110 U. S. 499), 203, 1031, 1032, 1039.
Irwin v. Workman (3 Watts, 357), 1455.
Isle Royale Mining Co. v. Hertin (37 Mich. 332), 640.
Ives v. Carter (24 Conn. 392), 937.
Ivory v. Murphy (36 Mo. 534), 425, 449.
Jack v. Railroad Co. (53 Iowa, 401), 1235, 1242.
Jackson v. Allaway (6 Man. & Gr. 942), 1188.
Jackson v. Allen (120 Mass. 64), 834.
Jackson v. Anderson (4 Wend. 474), 759.
Jackson v. Anderson (4 Taunt. 24), 702, 711, 714.
Jackson v. Armstrong (50 Mich. 65), 1843.
Jackson v. Brown (102 Ga. 87), 1427.
Jackson v. Cleveland (15 Mich. 94), 947.
Jackson v. Collins (39 Mich. 557), 881.
Jackson v. Crysler (1 Johns. Cas. 125), 1072.
Jackson v. Evans (44 Mich. 510), 1787.
Jackson v. King (4 Cow. 207), 64, 65.
Jackson v. Langston (61 Ga. 392), 1260.
Jackson v. Lowe (1 Bing. 9), 428.
Jackson v. Mott (76 Iowa, 265), 1235, 1238, 1242, 1244, 1395.
Jackson v. Myers (18 Johns. 425), 970.
Jackson v. Nichol (5 Bing. N. C. 508), 1577, 1578, 1610.
Jackson v. Plyler (38 S. C. 496), 973.
Jackson v. Tupper (101 N. Y. 515), 419.
Jaeger v. Kelley (52 N. Y. 274), 954.
Jaffray v. Moss (41 La. Ann. 548), 892.
Jaffray v. Wolf (4 Okl. 303), 912, 1411.
Jaggar v. Winslow (30 Minn. 263), 872.
Jagger Iron Co. v. Walker (76 N. Y. 521), 1428.
James v. Adams (16 W. Va. 245), 1092.
James v. Adams (3 W. Va. 568), 1831.
James v. Bird (8 Leigh, 510), 1482.
James v. Bocage (45 Ark. 284), 1225, 1247.
James v. Griffin (2 Mees. & W. 623), 1577, 1591.
James v. Isaacs (12 C. B. 791), 1466.
James v. Marion Fruit Jar Co. (69 Mo. App. 207), 244, 246, 251.
James v. Muir (33 Mich. 223), 207, 208, 438.
James v. Patton (6 N. Y. 9), 456.
James v. Plank (48 Ohio St. 255), 29.
James v. Williams (5 B. & Ad. 1109), 226.
Jameson v. Gregory (4 Metc. 363), 676, 682.
Jamieson v. Indiana Gas Co. (128 Ind. 555), 1099.
Jamieson v. Wallace (167 Ill. 388), 1031.
Jamison v. Harbert (87 Iowa, 186), 1303.
Jamison v. Simon (68 Cal. 17), 356.
Jandt v. Potthast (102 Iowa, 223), 893.
Janney v. Boyd (30 Minn. 319), 1447.
Janney v. Sleeper (30 Minn. 473), 734, 739, 1124, 1181.
Jansen v. McCahill (22 Cal. 563), 451.
Janvrin v. Maxwell (23 Wis. 51), 1198.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Jarecki Mfg. Co. v. Kerr (165 Pa. St. 529), 1337, 1349.
Jarrett v. Goodnow (39 W. Va. 602), 1302.
Jarvis v. Davis (14 B. Mon. 424), 960, 964.
Javrin v. Maxwell (23 Wis. 51), 385.
Jay v. Wilson (91 Hun, 391), 668.
Jefferson v. Querner (30 L. T. 867), 1158.
Jefford v. Ringgold (6 Ala. 544), 103.
Jeffrey v. Bigelow (13 Wend. 518), 935, 1825.
Jeffrey Mfg. Co. v. Central Coal Co. (93 Fed. R. 408), 1374.
Jeffris v. Fitchburg R. R. Co. (93 Wis. 250), 1540, 1582, 1601, 1602.
Jelks v. Barrett (52 Miss. 315), 426.
Jellett v. St. Paul Ry. Co. (30 Minn. 265), 1786.
Jendevine v. Slade (2 Esp. 572), 1242.
Jenkins v. Eichelberger (4 Watts, 121), 23, 50, 580, 1482.
Jenkins v. Green (27 Beav. 437), 264.
Jenkins v. Jarrett (70 N. C. 255), 493.
Jenkins v. Richardson (6 J. J. Marsh. 442), 207.
Jenkinson v. Monroe (61 Mich. 454), 760.
Jenks v. Fulmer (160 Pa. St. 527), 1592.
Jenks v. Howe Sewing Mach. Co. (34 La. Ann. 1241), 1629.
Jenkyn v. Vaughn (3 Drew. 419), 974.
Jenkyns v. Brown (14 Q. B. 496), 779, 782, 787.
Jenkyns v. Usborne (7 Mann. & Gr. 678), 1536, 1604.
Jenner v. Smith (L. R. 4 C. P. 270), 730, 731.
Jenner v. Walker (19 L. T. 398), 132.
Jenness v. Iron Co. (53 Me. 20, 227, 229, 233, 239, 428.
Jenness v. Wendell (51 N. H. 63), 351.
Jennings v. Carter (2 Wend. 446), 966.
Jennings v. Chenango County Ins. Co. (2 Denio, 75), 1272.
Jennings v. Dunham (60 Mo. App. 635), 407.
Jennings v. Flanagan (5 Dana, 217), 508, 514, 532.
Jennings v. Gage (13 Ill. 610), 41, 923.
Jennings v. Gratz (3 Rawle, 168), 1338.
Jennings v. Throgmorton (Ry. & Moo. 251), 1022.
Jennings v. Wilson (71 Miss. 42), 599, 603.
Jensen v. Bowles (8 S. Dak. 570), 23.
Jeraulds v. Brown (64 N. H. 606), 714.
Jetton v. Tobey (62 Ark. 84), 154, 156.
Jewett v. Lincoln (14 Me. 116), 987.
Jewett v. Warren (12 Mass. 300), 380, 382, 981, 987, 1197.
Joest v. Williams (42 Ind. 565), 87.
Johnson v. Bailey (17 Colo. 59), 508.
Johnson v. Baird (3 Blackf. 153), 1125.
Johnson v. Brooks (93 N. Y. 337), 1724, 1727.
Johnson v. Buck (35 N. J. L. 338), 327, 426, 461, 462.
Johnson v. Credit Lyonnais (2 C. P. Div. 224), 169.
Johnson v. Cuttle (105 Mass. 447), 365, 369.
Johnson v. Dodgson (2 M. & W. 653), 393, 451, 460, 1181, 1496.
Johnson v. Dooley (65 Ark. 71), 1440, 1442.
Johnson v. Eveleth (93 Mo. 306), 1526, 1551, 1602.
Johnson v. Farnum (56 Ga. 144), 1482.
Johnson v. Gibson (4 E. D. Smith, 231), 186.
Johnson v. Gulick (46 Neb. 817), 875.
Johnson v. Hibbard (29 Oreg. 184), 731, 756, 1185.
Johnson v. Holloway (82 Ill. 334), 960.
Johnson v. Hudson (11 East, 180), 1046, 1051.
Johnson v. Hunt (11 Wend. 139), 759, 761.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Johnson v. Latimer (71 Ga. 470), 1259.
Johnson v. Laybourne (56 Minn. 332), 1307.
Johnson v. Lines (6 Watts & S. 80), 127, 128, 132.
Johnson v. MacDonald (9 M. & W. 600), 652.
Johnson v. McLane (7 Blackf. 501), 676, 908.
Johnson v. Meyers (34 Mo. 255), 1794, 1798.
Johnson v. Morley (Hill & Den. 29), 947.
Johnson v. Oehrnig (95 Ala. 189), 1795.
Johnson v. Powers (65 Cal. 179), 1254.
Johnson v. Railway Co. (3 C. P. D. 499), 736.
Johnson v. Raylton (7 Q. B. Div. 438), 1353.
Johnson v. Reed (9 Mass. 78), 804.
Johnson v. Stephenson (26 Mich. 63), 227, 228.
Johnson v. Stoddard (100 Mass. 306), 736.
Johnson v. Stone (40 N. H. 197), 189.
Johnson v. Stratton (6 Tex. Civ. App. 431), 909.
Johnson v. Trinity Church (11 Allen, 123), 431.
Johnson v. Triplett (66 Ark. 233), 904.
Johnson v. Whitman Agl. Works (20 Mo. App. 100), 816, 1805.
Johnson v. Willis (7 Gray, 164), 1053.
Johnson Railroad Signal Co. v. Union Signal Co. (51 Fed. R. 85), 175.
Johnson-Brinkman Co. v. Central Bank (116 Mo. 558), 543, 545, 555, 1121, 1407, 1433.
Johnson-Brinkman Co. v. Railway Co. (126 Mo. 344), 619.
Johnston v. Browne (37 Iowa, 200), 24, 29.
Johnston v. Cope (3 H. & J. 89), 1319.
Johnston v. Harvy (2 Pen. & W. 82), 955.
Johnston v. Kershaw (L. R. 2 Exch. 82), 1158.
Johnston v. McConnell (65 Ga. 129), 1050.
Johnston v. Trask (116 N. Y. 136), 145, 328.
Johnston v. Whittemore (27 Mich. 463), 588, 605, 628, 629, 630.
Johnston v. Wood (19 Wash. 441), 599, 603.
Johnstone v. Marke (19 Q. B. Div. 509), 127.
Johnstone v. Milling (16 Q. B. Div. 460), 1088, 1089, 1090.
Joliff v. Bendell (Ry. & Moo. 136), 1270.
Jolliffe v. Collins (21 Mo. 338), 834.
Jonassohn v. Young (4 B. & S. 296), 1075, 1141.
Jones v. Alley (17 Minn. 269), 1254.
Jones v. Berry (33 N. H. 209), 1047.
Jones v. Brewer (79 Ala. 545), 779.
Jones v. Bright (5 Bing. 533), 1344.
Jones v. Broadhurst (9 C. B. 173), 1466.
Jones v. Brown (167 Pa. St. 395), 1411.
Jones v. Bullitt (2 Litt. 49), 1420.
Jones v. Clark (20 Colo. 353), 600, 693.
Jones v. Comer (5 Leigh, 350), 947.
Jones v. Dow (142 Mass. 130), 434.
Jones v. Earl (37 Cal. 630), 1606, 1611.
Jones v. Foster (175 Ill. 459), 875.
Jones v. George (61 Tex. 345), 1156, 1209, 1334, 1392, 1774, 1824.
Jones v. Gibbon (8 Exch. 920), 1131.
Jones v. Hetherington (45 Iowa, 681), 953.
Jones v. Hoar (5 Pick. 285), 1411.
Jones v. Horn (51 Ark. 19), 1786.
Jones v. Jennings (168 Pa. St. 493), 1690.
Jones v. Jones (8 M. & W. 431), 1602.
Jones v. Just (L. R. 3 Q. B. 197), 1213, 1214, 1317, 1340, 1344, 1345, 1349, 1817, 1818, 1819.
Jones v. Kemp (49 Mich. 9), 30.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Jones v. Littledale (6 Ad. & E. 486), 447.
Jones v. Marsh (22 Vt. 144), 764.
Jones v. McEwan (91 Ky. 373), 1392.
Jones v. Mechanics' Bank (29 Md. 287), 358, 363, 1402.
Jones v. Murray (3 T. B. Mon. 83), 1357.
Jones v. Padgett (24 Q. B. Div. 650), 1214, 1329, 1342, 1344.
Jones v. Pearce (25 Ark. 545), 520.
Jones v. Perkins (29 Miss. 139), 1417.
Jones v. Phenix Bank (4 Seld. 228), 121.
Jones v. Rahilly (16 Minn. 320), 40.
Jones v. Reynolds (120 N. Y. 213), 331, 358, 360, 381.
Jones v. Schneider (22 Minn. 279), 746.
Jones v. Snider (99 Ga. 276), 619.
Jones v. Surprise (64 N. H. 243), 1028.
Jones v. Taylor (30 Vt. 42), 649.
Jones v. United States (96 U. S. 24), 1103, 1138.
Jones v. Wasson (3 Baxt. 211), 1325.
Jones v. Williams (7 M. & W. 493), 428.
Jones v. Wright (71 Ill. 61), 671, 682.
Joplin Water Co. v. Bathe (41 Mo. App. 285), 1357.
Jordan v. Coffield (70 N. C. 110), 130, 131, 132.
Jordan v. James (5 Ohio, 88), 1612.
Jordan v. Norton (4 M. & W. 155), 227, 228.
Jordan v. Parker (56 Me. 557), 924.
Jordan v. Patterson (67 Conn. 473), 241, 246, 1760, 1762, 1763.
Jordan v. Pickett (78 Ala. 331), 884.
Jordan v. Stevens (51 Me. 78), 872.
Jordan v. Wells (104 Ala. 383), 588.
Jordan v. Wright (45 Ark. 237), 186.
Joseph v. Brandy (112 Mich. 579), 696.
Joslin v. Cowee (52 N. Y. 90), 909.
Joslin v. Giese (59 N. J. L. 130), 1423.
Josling v. Kingsford (13 C. B. 446), 1333.
Joslyn v. Grand Trunk Ry. Co. (51 Vt. 92), 774, 1194.
Journey v. Priestly (70 Miss. 584), 599.
Jowers v. Blandy (58 Ga. 379), 583.
Joy v. Bitzer (77 Iowa, 73), 1268.
Joy v. Sears (9 Pick. 4), 1201.
Joyce v. Adams (8 N. Y. 291), 498, 520, 521.
Joyce v. Swann (17 C. B., N. S., 84), 218, 484, 740, 775, 779, 787.
Judd v. Day (50 Iowa, 247), 245.
Judd v. Weber (55 Conn. 267), 877.
Judkins v. Walker (17 Me. 38), 109.
Judson v. Lyford (84 Cal. 505), 953.
Justh v. Holliday (2 Mackey, 346), 1036.
Justice v. Lang (42 N. Y. 493), 1450.
Juzan v. Toulmin (9 Ala. 662), 64, 65.
Kadish v. Young (108 Ill. 170), 1088, 1089, 1090, 1707.
Kahn v. Klabunde (50 Wis. 235), 660.
Kahn v. Walton (46 Ohio St. 195), 1031, 1039.
Kain v. Larkin (131 N. Y. 300), 972.
Kain v. Old (2 B. & C. 627), 1255.
Kanaga v. Taylor (7 Ohio St. 134), 649.
Kane v. Clough (36 Mich. 436), 200, 202.
Kane v. Loder (56 N. J. Eq. 268), 1305.
Kane v. Roberts (40 Md. 590), 976.
Kansas City R. Co. v. Coal Co. (97 Ala. 705), 1433.
Kase v. John (10 Watts, 109), 1805.
Kauffman v. Klang (16 Misc. 379), 603.
Kaufman v. Schilling (58 Mo. 218), 711.
Kaufman Bros. & Co. v. Farley Mfg. Co. (78 Iowa, 679), 264.
Kearley v. Thomson (24 Q. B. Div. 742), 999, 1002.
Kearney v. Doyle (22 Mich. 294), 1713.
Kearney v. Vaughan (50 Mo. 284), 946.
Kearney Milling Co. v. Union Pacific Ry. Co. (97 Iowa, 719), 901, 906, 911.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Keats v. Lord Cadogan (10 C. B. 591), 869.
Keck v. State (12 Ind. App. 119), 588, 597, 1424.
Keeder v. Murphy (43 Iowa, 413), 957.
Keeler v. Field (1 Paige, 312), 1437.
Keeler v. Goodwin (111 Mass. 490), 714, 1514, 1516.
Keeler v. Jacobs (87 Wis. 545), 660.
Keenan v. Stimson (32 Minn. 377), 649.
Kehr v. Smith (20 Wall. 36), 975.
Keil v. Healey (84 Ill. 104), 95.
Kein v. Tupper (52 N. Y. 550), 513, 520, 532, 552, 1162.
Keith v. Clark (97 U. S. 454), 1024.
Keith v. Hirschberg Optical Co. (48 Ark. 138), 1291.
Keith v. Hobbs (69 Mo. 84), 834.
Keiwert v. Meyer (62 Ind. 587), 365.
Kellam v. Brown (112 N. C. 451), 49.
Kelley v. Cosgrove (83 Iowa, 229), 1053.
Kelley v. Davis (49 N. H. 187), 186.
Kelley v. Ohio Oil Co. (57 Ohio St. 317), 347.
Kelley v. Rowane (33 Mo. App. 440), 1106.
Keller v. Phillips (39 N. Y. 351), 183.
Keller v. Ybarru (3 Cal. 147), 224, 263.
Kellogg v. Costello (93 Wis. 232), 603.
Kellogg v. Denslow (14 Conn. 411), 1395.
Kellogg v. Lovely (46 Mich. 131), 636.
Kellogg v. Smith (26 N. Y. 18), 1453.
Kellogg v. Turpie (2 Ill. App. 55), 1411.
Kellogg v. Turpie (93 Ill. 265), 912, 1411.
Kellogg v. Witherhead (6 Thomp. & C. 525), 305, 382.
Kellogg Bridge Co. v. Hamilton (110 U. S. 108), 1317, 1318, 1344, 1346, 1349.
Kellogg Newspaper Co. v. Peterson (162 Ill. 158), 964, 1197.
Keily v. Mesier (46 N. Y. Supp. 61), 964.
Kelly v. Solari (9 M. & W. 54), 854.
Kelly v. Upton (5 Duer. 336), 41.
Kelsea v. Haines (41 N. H. 246), 499, 516, 518.
Kelsea v. Ramsey & Gore Mfg. Co. (55 N. J. L. 320), 756, 1181, 1182, 1187.
Kelsey v. Harrison (29 Kan. 143), 906.
Kelsey v. Kendall (48 Vt. 24), 604, 643.
Kemp v. Balls (10 Exch. 607), 1466.
Kemp v. Falk (7 App. Cas. 573), 1566, 1570, 1602.
Kemp v. Freeman (42 Ill. App. 500), 816, 1805, 1807.
Kemper Dry Goods Co. v. Kidder Savings Bank (72 Mo. App. 226), 887.
Kempner v. Cohn (47 Ark. 515), 258.
Kempner v. Churchill (8 Wall. 362), 954.
Kendall v. Marshall (11 Q. B. D. 356), 1561, 1575.
Kendall v. May (10 Allen, 62), 84.
Kendall v. Sampson (12 Vt. 515), 963.
Kendrick v. Lomax (2 Cr. & J. 405), 1428.
Kennebrew v. Southern Automatic, etc. Co. (106 Ala. 377), 1344.
Kennedy v. Conroy (—— Cal. ——). 964.
Kennedy v. Lee (3 Meriv. 441), 228.
Kennedy v. Panama, etc. Mail Co. (L. R. 2 Q. B. 580), 275.
Kennedy v. Whittie (27 Nova Scotia, 460), 492.
Kennedy v. Whitwell (4 Pick. 466), 1786.
Kenner v. Harding (85 Ill. 264), 868, 935, 1272.
Kenney v. Altvater (77 Pa. St. 34), 145.
Kenney v. Heirs (26 Neb. 213), 428.
Kenney v. Ingalls (126 Mass. 488), 546.
Kenniston v. Ham (29 N. H. 501), 213, 674.
Kent v. Bornstein (12 Allen, 342), 916, 1463.
Kent v. Bowker (38 Vt. 148), 1441.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Kent v. Buck (42 Vt. 18), 592.
Kent v. Friedman (101 N. Y. 616), 1395.
Kent v. Miltenberger (13 Mo. App. 503), 1032.
Kent v. Ricards (3 Md. Ch. 392), 1455.
Kent Iron Co. v. Norbeck (150 Pa. St. 559), 760.
Kenton v. Ratcliff (— Ky. —), 963.
Kentucky Club v. Louisville (92 Ky. 309), 55.
Kentucky Refining Co. v. Globe Refining Co. (— Ky. —), 779.
Kenworthy v. Schofield (2 B. & C. 945), 426.
Kerkhof v. Atlas Paper Co. (68 Wis. 674), 419.
Kern v. Thurber (57 Ga. 172), 923.
Kerr v. Bell (44 Mo. 120), 109.
Kerr v. Hayes (35 N. Y. 331), 1502.
Kerr v. Henderson (62 N. J. L. 734), 502.
Kerr v. Smith (5 B. Mon. 552), 1392.
Kerwin v. Doran (29 Mo. App. 397), 1013.
Kessler v. Smith (42 Minn. 494), 736, 1181.
Kester v. Miller (119 N. C. 475), 1844.
Ketchum v. Brennan (53 Miss. 596), 599, 629.
Ketchum v. Catlin (21 Vt. 191), 277.
Ketchum v. Wells (19 Wis. 26), 1079, 1340, 1345.
Ketchum v. Zeilsdorff (26 Wis. 514), 1106.
Key v. Cotesworth (7 Exch. 595), 775.
Keyser v. District No. 8 (35 N. H. 477), 333.
Keystone Watch Case Co. v. Fourth Street National Bank (194 Pa. St. 535), 48.
Kibble v. Gough (38 L. T. 204), 369.
Kiddell v. Burnard (9 M. & W. 668), 1270.
Kidder v. Blake (45 N. H. 530), 1004.
Kidney v. Consomaher (12 Ves. 156), 974.
Kilgore v. Bruce (166 Mass. 136), 937, 1843.
Kilgore v. Rich (83 Me. 305), 132.
Killmore v. Howlett (48 N. Y. 569), 305.
Kimball v. Bruce (58 N. H. 327), 109.
Kimball v. Cunningham (4 Mass. 502), 910, 914.
Kimball v. Farnum (61 N. H. 348), 628.
Kimball v. Jackman (42 N. H. 242), 599.
Kimball v. Post (44 Wis. 471), 603.
Kimball v. Rowland (6 Gray, 224), 1080.
Kimball Co. v. Mellon (80 Wis. 133), 564, 583, 592, 603.
Kimberley v. Patchin (19 N. Y. 360), 519, 702, 708, 711, 714, 759, 1158, 1505.
King v. Bates (57 N. H. 446), 599.
King v. Batterson (13 R. I. 117), 267.
King v. Brown (24 Ill. App. 579), 902.
King v. Faist (161 Mass. 449), 806, 1087.
King v. Finch (60 Ind. 420), 1417.
King v. Green (6 Allen, 139), 1053.
King v. Jarman (35 Ark. 190), 387, 527, 528.
King v. Rochester (67 N. H. 310), 1154.
King v. Towsley (64 Iowa, 75), 1384.
King v. Wilcox (11 Paige, 594), 974.
King v. Wood (7 Mo. 389), 429.
King Philip Mills v. Slater (12 R. I. 82), 1145, 1148.
Kinghorne v. Telegraph Co. (18 U. C. Q. B. 60), 224.
Kingman v. Denison (84 Mich. 608), 1542, 1564, 1596.
Kingman v. Hotaling (25 Wend. 423), 1411.
Kingman v. Perkins (105 Mass. 111), 95, 97.
Kingman v. Watson (97 Wis. 596), 1387, 1396.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Kingman & Co. v. Hanna Wagon Co. (176 Ill. 547), 1130, 1702.
Kingman & Co. v. Western Mfg. Co. (34 C. C. A. 489), 1701.
Kingsbury v. Smith (13 N. H. 109), 148.
Kingsbury v. Taylor (29 Me. 508), 1311.
Kingsford v. Merry (11 Ex. 577), 148, 923, 924.
Kingsford v. Merry (1 H. & N. 503), 269.
Kingsley v. Holbrook (45 N. H. 313), 336.
Kingsley v. Johnson (49 Conn. 462), 1244.
Kingsley v. White (57 Vt. 565), 964, 1197.
Kinley v. Fitzpatrick (4 How. 59), 862, 1229.
Kinloch v. Craig (3 T. R. 119), 1534.
Kinney v. Cay (39 Minn. 210), 603.
Kinney v. Kiernan (49 N. Y. 164), 909.
Kinney v. McDermot (55 Iowa, 674), 1053.
Kinsman v. Kershaw (119 Mass. 140), 1450.
Kipp v. Bingham (6 Johns. 157), 1798.
Kipp v. Meyer (5 Hun, 111), 1390.
Kirby v. Johnson (22 Mo. 354), 382, 386.
Kirby v. Milling Co. (105 Ala. 529), 1050.
Kirby v. Tompkins (48 Ala. 273), 633.
Kircher v. Conrad (9 Mont. 191), 832, 1242, 1244.
Kirk v. Hiatt (2 Ind. 322), 1455.
Kirkland v. Carr (35 Miss. 584), 1131.
Kirkpatrick v. Adams (20 Fed. R. 825), 1031.
Kirkpatrick v. Alexander (60 Ind. 95), 1136.
Kirkpatrick v. Bonsall (72 Pa. St. 155), 1034.
Kirkpatrick v. Puryear (93 Tenn. 409), 1433.
Kirkwood v. Hoxie (95 Mich. 62), 619.
Kirtland v. Snow (20 Conn. 23), 982.
Kissam v. Edmundson (1 Ired. Eq. 180), 975.
Kitchen v. Lee (11 Paige, 107), 109, 121.
Kitchen v. Spear (30 Vt. 545), 1571, 1578.
Kitchen v. Stokes (9 W. N. Cas. 48), 1082.
Kitzinger v. Sanborn (70 Ill. 146), 1103.
Kleckley v. Leyden (63 Ga. 215), 1050.
Klee v. Reitzenberger (23 W. Va. 749), 964.
Kleeb v. Bard (7 Wash. 41), 1337.
Kleeman v. Collins (9 Bush, 460), 432.
Kleeman v. Peltzer (17 Neb. 381), 948.
Klein v. Livingstone Club (177 Pa. St. 224), 55.
Klein v. Seibold (89 Ill. 540), 154.
Kline v. Baker (99 Mass. 253), 757.
Kline v. Baker (106 Mass. 57), 901.
Kline v. Kline (57 Pa. St. 120), 872.
Kline v. L'Amoureux (2 Paige, 419), 127, 128.
Kling v. Fries (33 Mich. 275), 1028.
Knapp v. Wolverton (47 Mich. 292), 342.
Knapp Electrical Works v. New York Insulated Wire Co. (157 Ill. 456), 741.
Kneass v. Schuylkill Bank (4 Wash. C. C. 12), 834.
Kneeland v. Renner (2 Kan. App. 451), 485, 492, 502.
Knight v. Burnham (90 Me. 294), 1050.
Knight v. Crockford (1 Esp. 190), 451, 456.
Knight v. Mann (118 Mass. 143), 359, 362, 367, 369.
Knights v. Wiffin (L. R. 5 Q. B. 660), 170, 1503, 1505.
Knittel v. Cushing (57 Tex. 354), 576, 583.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Knoblauch v. Kronschnabel (18 Minn. 300), 1375.
Knowlton v. Redenbaugh (40 Iowa, 114), 599.
Knower v. Cadden Clothing Co. (57 Conn. 202), 953.
Knowles Loom Works v. Vacher (57 N. J. L. 490), 599, 603.
Knowlton v. Doherty (87 Mo. 518), 1027.
Knowlton v. Keenan (146 Mass. 86), 870.
Knowlton v. Newell (10 Allen, 34), 1131.
Knowlton v. Spring Co. (57 N. Y. 518), 999.
Knox v. Clifford (38 Wis. 651), 1054.
Knox v. Eden Musee Co. (148 N. Y. 441), 162.
Knox v. King (36 Ala. 367), 434.
Knuckolls v. Lea (10 Hump. 577), 909.
Koch v. Lyon (82 Mich. 513), 928.
Kohl v. Lindley (39 Ill. 195), 496, 498, 536, 1237, 1311, 1352.
Kohl v. Lynn (34 Mich. 360), 924.
Kohler v. Hayes (41 Cal. 455), 569, 585, 599.
Kohn v. Milcher (43 Fed. R. 641), 1027.
Kohn v. Washer (64 Tex. 131), 179, 1447.
Kokomo Strawboard Co. v. Inman (134 N. Y. 92), 1147, 1148, 1664.
Koones v. District of Columbia (4 Mackey, 339), 1433.
Kornegay v. Kornegay (109 N. C. 188), 599, 603, 604.
Kornegay v. White (10 Ala. 255), 1270.
Kornemann v. Monaghan (24 Mich. 36), 1445, 1447, 1448.
Kost v. Reilly (62 Conn. 57), 651.
Kountz v. Dickson (40 Miss. 341), 1057.
Kountz v. Kirkpatrick (72 Pa. St. 378), 208.
Kountz v. Price (40 Miss. 341), 1055, 1057.
Kountze v. Kennedy (147 N. Y. 124), 875.
Kramer v. Messner (101 Iowa, 88), 823, 1655.
Kraus v. Thompson (30 Minn. 64), 908.
Krebs v. O'Grady (23 Ala. 726), 178.
Kreiss v. Seligman (8 Barb. 439), 1013.
Kribs v. Jones (44 Md. 396), 1103, 1129, 1736, 1748.
Kriete v. Myer (61 Md. 558), 440.
Krnavek v. State (38 Tex. Crim. R. 44), 55.
Krohn v. Bantz (68 Ind. 277), 406, 413.
Krohn v. Williamson (62 Fed. R. 869), 1727.
Krom v. Levy (3 N. Y. Supp. 704), 1161.
Krouse v. Woodward (110 Cal. 338), 1718, 1727.
Krouskop v. Shontz (51 Wis. 204), 138.
Krulder v. Ellison (47 N. Y. 36), 736, 1181.
Krumbhaar v. Birch (83 Pa. St. 426), 1303, 1795.
Krumm v. Beach (96 N. Y. 398), 1843.
Kuehn v. Wilson (13 Wis. 104), 1223.
Kugler v. Wiseman (20 Ohio, 361), 1106.
Kuhns v. Gates (92 Ind. 66), 1057.
Kunkle v. Mitchell (56 Pa. St. 100), 1081, 1130.
Kuppenheimer v. Wertheimer (107 Mich. 77), 731.
Kurtz v. Frank (76 Ind. 594), 1090.
Kuykendall v. McDonald (15 Mo. 416), 951, 954.
Kyle v. Kavanaugh (103 Mass. 356), 228, 272.
Kyle v. Ward (81 Ala. 120), 903, 904.
Lackey v. Stouder (2 Ind. 376), 1302.
Lackington v. Atherton (7 M. & G. 360), 1493.
Ladd v. Dillingham (34 Me. 316), 1004.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Ladd v. Moore (3 Sandf. 589), 915, 919.
Ladd v. Wiggin (35 N. H. 421), 956.
Lady Arundell v. Phipps (10 Ves. 139), 1719.
Laidlaw v. Organ (2 Wheat. 178), 868.
Laidler v. Burlinson (2 M. & W. 602), 755.
Laird v. Pim (7 M. & W. 474), 1106.
Lake v. Morris (30 Conn. 201), 964.
Lake Shore R. Co. v. Hutchins (32 Ohio St. 571), 639.
Lake Shore, etc. Ry. Co. v. Nat. Live Stock Bank (178 Ill. 506), 1533.
Lake Shore, etc. R. Co. v. Richards (152 Ill. 59), 1089, 1090.
Lakeside Press Co. v. Campbell (39 Fla. 523), 1447, 1448.
Lamar Water Co. v. City of Lamar (140 Mo. 145), 1387.
Lamb v. Crafts (12 Metc. 353), 307, 324, 1254, 1337.
Lamb v. Durant (12 Mass. 54), 981, 1201.
Lamb v. Lamb (130 Ind. 273), 873.
Lamb v. Hirschberg (1 N. Y. App. Div. 519), 1450.
Lambert v. McCloud (63 Cal. 162), 613.
Lamman v. McGregor (94 Ind. 301), 1660.
Lamme v. Gregg (1 Metc. 444), 1235, 1242.
La Mont v. La Fevre (96 Mich. 175), 1407.
L'Amoureaux v. Crosby (2 Paige, 422), 69, 70.
Lamprey v. Sargent (58 N. H. 241), 702, 703.
Lamson v. Patch (5 Allen, 586), 964.
Lancaster v. Knickerbocker Ice Co. (153 Pa. St. 427), 1450.
Lancaster County Bank v. Moore (78 Pa. St. 407), 74, 75.
Landa v. Latten (19 Tex. Civ. App. 246), 1816.
Landigan v. Mayer (32 Oreg. 245), 593, 646.
Landman v. Bloomer (117 Ala. 312), 1240, 1254.
Lane v. Bishop (65 Vt. 575), 138.
Lane v. Chadwick (146 Mass. 68), 740.
Lane v. Dudley (2 Murph. 119), 1294.
Lane v. Jackson (5 Mass. 157), 1292.
Lane v. Neale (2 Stark. 105), 41.
Lanfear v. Sumner (17 Mass. 110), 981, 984, 989, 990.
Lang v. Lynch (38 Fed. R. 489), 1028.
Lang's Appeal (81 Pa. St. 18), 755.
Lang's Heirs v. Waring (25 Ala. 625), 1307.
Langdon v. Clayson (75 Mich. 204), 100.
Langdon v. De Groot (1 Paine, 203), 834.
Langdon v. Potter (13 Mass. 319), 1455.
Langfort v. Tiler (1 Salk. 113), 404.
Langridge v. Levy (2 M. & W. 519), 878.
Langstaff v. Stix (64 Miss. 171), 1582.
Langton v. Higgins (4 H. & N. 402), 727, 735.
Langton v. Hughes (1 M. & S. 593), 1012, 1015.
Langworthy v. Little (12 Cush. 109), 649.
Lanier v. Auld (1 Murph. 138), 1311.
Lankton v. Stewart (27 Minn. 346), 1419.
Lansden v. McCarthy (45 Mo. 106), 267.
Lansing v. Turner (2 Johns. 13), 483.
Lansing Iron & Engine Works v. Walker (91 Mich. 409), 599, 645.
Lansing Iron Works v. Wilbur (11 Mich. 413), 599.
Laporte Imp. Co. v. Brock (99 Iowa, 485), 1395.
Laraway v. Perkins (10 N. Y. 371), 1709.
Larkin v. Mitchell Lumber Co. (42 Mich. 196), 746, 1160.
Larmon v. Jordan (56 Ill. 204), 244, 252.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Larned v. Andrews (106 Mass. 435), 1046, 1051.
Larson v. Aultman (86 Wis. 281), 1395, 1811.
Larsen v. Breene (12 Colo. 480), 1434.
La Rue v. Gilkyson (4 Pa. St. 375), 84.
Lassing v. James (107 Cal. 348), 519, 1618, 1674, 1677, 1810.
Latham v. Bausmann (39 Minn. 57), 1384.
Latham v. Davis (44 Fed. R. 862), 629.
Latham v. Shipley (86 Iowa, 543), 1235, 1240, 1242.
Latham v. Sumner (89 Ill. 233), 622, 629.
Lathrop v. Clayton (45 Minn. 124), 964.
Lathrop v. Page (129 Mass. 19), 1419.
Laubach v. Laubach (73 Pa. St. 387), 685.
Laughton v. Harden (68 Me. 208), 973.
Law v. Hodgson (2 Camp. 147), 1045.
Law v. Hodson (11 East, 300), 1050.
Law v. Long (41 Ind. 586), 79.
Law v. Stokes (3 Vroom, 249), 1447, 1448, 1450.
Lawes v. Purser (6 El. & Bl. 930), 834.
Lawrence v. Gayetty (78 Cal. 126), 870.
Lawrence v. Gifford (17 Pick. 366), 1072.
Lawrence v. Porter (22 U. S. App. 483), 1740, 1754, 1755.
Lawrence Canning Co. v. Lee Mercantile Co. (5 Kan. App. 77), 1690.
Lawry v. Ellis (85 Me. 500), 714.
Lawson v. De Bolt (78 Ind. 564), 9.
Lawson v. Lovejoy (8 Greenl. 405), 121.
Lawton v. Blitch (83 Ga. 663), 1031.
Lawton v. Gordon (34 Cal. 36), 947.
Lawton v. Kittridge (30 N. H. 500), 936.
Laythoarp v. Bryant (2 Bing. N. C. 735), 449.
Lazarus v. Bank (72 Tex. 354), 564.
League v. Waring (85 Pa. St. 244), 1426, 1435.
Leask v. Scott (2 Q. B. Div. 376), 1563, 1565.
Leath v. Uttley (66 Tex. 82), 599.
Leather Cloth Co. v. Hieronimus (L. R. 10 Q. B. 140), 428, 806.
Leatherbury v. Connor (54 N. J. L. 172), 555.
Leavitt v. Dover (67 N. H. 94), 1103.
Leavitt v. Fairbanks (92 Me. 521), 170.
Leavitt v. Fletcher (60 N. H. 182), 880, 1272.
Leavitt v. Morrow (6 Ohio St. 71), 1467.
Ledwich v. McKim (53 N. Y. 307), 838, 1793, 1849.
Ledyard v. Hibbard (48 Mich. 421), 25, 28.
Lee v. Bangs (43 Minn. 23), 1374, 1382, 1392.
Lee v. Cherry (85 Tenn. 707), 428, 432, 435.
Lee v. Figg (37 Cal. 328), 958.
Lee v. First Nat. Bank (45 Kan. 8), 143.
Lee v. Gaskell (1 Q. B. Div. 700), 329, 333.
Lee v. Griffin (1 Best & Smith, 272), 302, 305, 307, 309, 313, 314.
Lee v. Kimball (45 Me. 172), 924, 1565
Lee v. Lee (4 McCord, 183), 67.
Lee v. Mahony (9 Iowa, 344), 426.
Lee v. Munroe (11 U. S. 366), 191.
Lee v. Openheimer (32 Me. 253), 1419.
Lee v. Sickles Saddlery Co. (38 Mo. App. 201), 1344.
Lee v. Simmons (65 Wis. 523), 901, 914.
Lee Bros. Furn. Co. v. Cram (63 Conn. 433), 603.
Lee Silver Mining Co. v. Omaha, etc. Smelting Co. (16 Colo. 118), 264.
Leeds v. Wright (3 Bos. & Pul. 320), 1577.
Leeming v. Snaith (16 Q. B. 275), 1168.
Lees v. Whitcomb (5 Bing. 34), 226.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Leffingwell v. White (1 Johns. Cas. 99), 1135.
Legg, In re (96 Fed. R. 326), 650.
Legg v. Willard (17 Pick. 140), 964.
Leggatt v. Brewing Co. (60 Ill. 158), 1265, 1298.
Leggett v. Young (29 New Bruns. 675), 1331, 1358.
Leggett & Meyer Co. v. Collier (89 Iowa, 144), 365, 736, 738, 739, 1387.
Le Grand v. National Bank (81 Ala. 123), 903, 904, 923.
Lehenbenter & C. Co. v. McCord (65 Mo. App. 507), 440.
Lehigh Co. v. Field (8 W. & S. 232), 32.
Lehigh Zinc & Iron Co. v. Bamford (150 U. S. 665), 871, 875.
Lehmberg v. Biberstein (51 Tex. 457), 976.
Lehman v. Shackleford (50 Ala. 437), 872.
Lehman v. Strassberger (2 Woods, 554), 1032, 1039.
Lehman v. Warren (53 Ala. 535), 543.
Leigh v. Mobile & Ohio R. Co. (58 Ala. 178), 156, 601.
Leigh v. Patterson (8 Taunt. 540), 1088.
Leitch v. Gillette-Herzog Mfg. Co. (64 Minn. 434), 1324.
Lemayne v. Stanley (3 Lev. 1), 451.
Lemen v. Robinson (59 Ill. 115), 960.
Lemmon v. Beeman (45 Ohio St. 505), 118.
Lemonius v. Mayer (71 Miss. 514), 1043.
Lempriere v. Pasley (2 T. R. 485), 380.
Lentz v. Flint & P. M. Ry. Co. (53 Mich. 444), 1594.
Lenz v. Harrison (148 Ill. 598), 49.
Leon v. Goldsmith (69 Ill. App. 22), 920.
Leonard v. Beaudry (68 Mich. 312), 1709.
Leonard v. Davis (1 Black, 476), 485, 493, 502, 518, 1197, 1481.
Leonard v. Fowler (44 N. Y. 289), 1320, 1328.
Leonard v. Leonard (14 Pick. 283), 69, 72.
Leonard v. Medford (85 Md. 666), 337.
Leonard v. Portier (15 S. W. R. 414), 1633, 1634.
Leonard v. Stott (108 Mass. 46), 132.
Leonard v. Winslow (2 Grant's Cas. 139), 41.
Leopold v. Van Kirk (27 Wis. 152), 1265, 1298, 1317, 1346.
Le Page v. McCrea (1 Wend. 164), 1420.
Lerned v. Wannemacher (9 Allen, 412), 426.
Lesassier v. The Southwestern (2 Woods, 35), 1565.
Lester v. Buel (49 Ohio St. 240), 1031.
Lester v. East (49 Ind. 588), 508, 714.
Lester v. Heidt (86 Ga. 226), 439.
Lester v. Palmer (4 Allen, 145), 884.
Levan v. Witten (135 Pa. St. 61), 585, 624.
Leven v. Smith (1 Denio, 571), 542, 543, 551, 1437.
Levi v. Booth (58 Md. 300), 154, 158, 160.
Levi v. Bray (12 Ind. App. 9), 905.
Levin v. Russell (42 N. Y. 251), 963.
Levy v. Cohen (4 Ga. 1), 247.
Levy v. Green (8 El. & Bl. 575), 1158.
Levy v. Green (1 E. & E. 969), 746, 1158.
Levy v. Scott (115 Cal. 39), 964.
Lewark v. Carter (117 Ind. 206), 856.
Lewenberg v. Hayes (91 Me. 104), 549.
Lewis v. Baird (3 McLean, 56), 67.
Lewis v. Brass (3 Q. B. D. 667), 235.
Lewis v. Browning (130 Mass. 173), 247, 250.
Lewis v. Evans (108 Iowa, 296), 325.
Lewis v. Galena, etc. R. R. Co. (40 Ill. 281), 752.
Lewis v. Greider (51 N. Y. 231), 1638, 1643.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Lewis v. Hofer (16 N. Y. Supp. 534), 1134.
Lewis v. Hubbard (1 Lea, 436), 1812.
Lewis v. Jewell (151 Mass. 345), 938.
Lewis v. Latham (74 N. C. 283), 1013, 1024.
Lewis v. Mason (36 Up. Can. Q. B. 590), 1586, 1587, 1604.
Lewis v. Metcalf (53 Kan. 217), 1450.
Lewis v. McCabe (49 Conn. 141), 597, 599.
Lewis v. Roundtree (78 N. C. 323), 1235, 1334, 1345, 1393, 1395, 1817, 1833.
Lewis v. Steiner (84 Tex. 364), 1482.
Lewis v. Thatcher (15 Mass. 431), 1264.
Lewis v. Wood (153 Mass. 321), 434.
Libbey v. Downey (5 Allen, 299), 1046, 1050.
Libby v. Haley (91 Me. 331), 1805.
Libby v. Ingalls (124 Mass. 503), 774.
Lickbarrow v. Mason (5 T. R. 683), 1501.
Lickbarrow v. Mason (1 H. Bl. 357), 1526.
Lickbarrow v. Mason (1 Smith's L. C. 388), 269.
Lickbarrow v. Mason (2 T. R. 63), 1563.
Lickbarrow v. Mason (4 Bro. P. C. 57), 1526.
Liddard v. Kain (9 Moore, 356), 1273.
Liddell v. Sahline (55 Ark. 627), 187.
Lieberman v. Puckett (94 Tenn. 273), 629.
Liebes v. Steffy (— Ariz. —), 960.
Lightburn v. Cooper (1 Dana, 273), 1805.
Lighthouse v. Third Nat. Bank (162 N. Y. 336), 1733.
Lile v. Hopkins (12 Smed. & M. 299), 1302.
Lilienthal v. Ballou (125 Cal. 183), 951.
Lilienthal v. Suffolk Brewing Co. (154 Mass. 185), 211, 812, 939.
Lillie v. Dunbar (62 Wis. 198), 336, 603.
Lillywhite v. Devereux (15 M. & W. 285), 373, 389.
Lima Mach. Works v. Parsons (10 Utah, 105), 564.
Lindauer v. Hay (61 Iowa, 663), 895, 896, 901.
Lincoln v. Buckmaster (32 Vt. 652), 74, 77.
Lincoln v. Erie Preserving Co. (132 Mass. 129), 225, 429, 434.
Lincoln v. Gallagher (79 Me. 189), 1125, 1189.
Lincoln v. Quynn (68 Md. 299), 600.
Lincoln Shoe Mfg. Co. v. Sheldon (44 Neb. 279), 1690, 1694, 1695.
Lindley v. Lacy (17 C. B. 578), 1255.
Lindon v. Sharp (6 M. & G. 895), 960.
Lindsay v. Cundy (3 App. Cas. 459), 887.
Lindsey v. Rutherford (17 B. Mon. 245), 1051.
Lindsey v. Stone (123 Mass. 332), 1018.
Linforth, In re (Fed. Cas. No. 8,369), 49.
Linforth, In re (4 Sawy. 370), 49.
Lingham v. Eggleston (27 Mich. 324), 489, 499, 502, 516.
Lining v. Geddes (1 McCord, Eq. 304), 1718.
Linington v. Strong (107 Ill. 295), 881.
Linn v. Gunn (56 Mich. 447), 1241.
Linn v. Wright (18 Tex. 317), 960.
Linn-Boyd Tobacco Co. v. Terrill (13 Bush, 463), 461.
Linsley v. Tibbals (40 Conn. 522), 428.
Linton v. Butz (7 Pa. St. 89), 960, 964, 988, 1490.
Linton v. Porter (31 Ill. 107), 1795.
Lippincott v. Rich (19 Utah, 140), 599, 608, 633.
Litchfield v. Hutchinson (117 Mass. 195), 875.
Litt v. Cowley (7 Taunt. 169), 1606, 1611.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Little v. American, etc. Mach. Co. (67 Ind. 67), 1429.
Little v. Dougherty (11 Colo. 103), 429.
Little v. Little (13 Gray, 264), 69.
Little v. Mercer (9 Mo. 216), 1106.
Little v. Page (44 Mo. 412), 599.
Little v. Poole (9 B. & Cr. 192), 1050.
Little v. Van Syckle (115 Mich. 480), 1260, 1352.
Littlefield v. Perry (21 Wall. 221), 1729.
Littlejohn v. Shaw (159 N. Y. 188), 1077.
Little Pittsburgh Mining Co. v. Mining Co. (11 Colo. 223), 642.
Little Rock & Fort Smith Ry. Co. v. Page (35 Ark. 304), 965.
Little Rock & Ft. S. R. Co. v. Wiggins (65 Ark. 385), 1459.
Littleton v. Loan, etc. Ass'n (97 Ga. 172), 187.
Livermore v. White (74 Me. 453), 269.
Livesay v. Beard (22 W. Va. 585), 978.
Livingston v. Wagner (23 Nev. 53), 207, 1659.
Lloyd v. Brewster (4 Paige, 537), 908.
Lloyd v. Fulton (91 U. S. 479), 959.
Lloyd v. Loaring (6 Ves. 773), 1719.
Lloyd v. Williams (6 Colo. App. 157), 964.
Lobdell v. Hopkins (5 Cow. 516), 734, 1124, 1125.
Lobdell v. Stowell (51 N. Y. 70), 711.
Lobenstein v. United States (91 U. S. 324), 1169.
Lobstein v. Lehn (120 Ill. 549), 952, 978.
Locke v. Smith (41 N. H. 346), 109, 123.
Locke v. Williamson (40 Wis. 377), 1380, 1392, 1395.
Lockhart v. Bonsall (77 Pa. St. 53), 1127, 1130, 1158.
Lockhart v. Wyatt (10 Ala. 231), 1458.
Loder v. Kekule (3 Com. B., N. S., 128), 1817.
Loeb v. Peters (63 Ala. 243), 1539, 1563, 1564, 1565, 1579.
Logan v. Gardner (136 Pa. St. 588), 95.
Logan v. Le Mesurier (6 Moore, P. C. 116), 479, 515.
Logwood v. Hussey (60 Ala. 417), 692.
Lomi v. Tucker (4 Car. & P. 15), 1242.
London Joint Stock Bank v. Simmons (App. Cas. 201), 156, 162.
London, etc. Bank, In re (34 Law J. Ch. 418), 1428.
London & Northwestern Ry. Co. v. Bartlett (7 H. & N. 400), 787, 1556.
Lonergan v. Stewart (55 Ill. 49), 21, 23.
Long v. Conklin (75 Ill. 32), 1745, 1746.
Long v. Hickingbottom (28 Miss. 772), 1302.
Long v. Hicks (2 Humph. 305), 1272.
Long v. Long (9 Md. 348), 74.
Long v. Millar (4 C. P. Div. 450), 426.
Long v. Spruill (58 N. C. 96), 702.
Long v. Warren (68 N. Y. 426), 879, 880.
Long v. White (42 Ohio St. 59), 334.
Long v. Williams (74 Ind. 115), 108.
Long v. Woodman (58 Me. 49), 874, 937.
Longworth v. Mitchell (26 Ohio St. 334), 244.
Loomis v. Bragg (50 Conn. 228), 569, 614, 620, 625.
Loomis v. Wainwright (21 Vt. 520), 14.
Loper v. Robinson (54 Tex. 510), 875.
Lord v. Buchanan (69 Vt. 320), 589, 592.
Lord v. Edwards (148 Mass. 476), 492, 739, 1265.
Lord v. Grow (39 Pa. St. 88), 1242, 1311.
Loring v. Boston (7 Metc. 409), 245.
Lorymer v. Smith (1 B. & Cr. 1), 1208.
Loucheim v. Seyforth (49 Ill. App. 561), 964.
Loud v. Campbell (26 Mich. 239), 1831.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Loughridge v. Bowland (52 Miss. 546), 971.
Louisiana, etc. Co. v. Bass, etc. Works (30 U. S. App. 433), 1384.
Louisville Asphalt Varnish Co. v. Lorick (29 S. C. 533), 426, 428.
Louisville R. Co. v. Alexander (27 S. W. R. 981), 138.
Louisville Ry. Co. v. Herr (135 Ind. 591), 72.
Louisville, etc. R. R. Co. v. Hollerbach (105 Ind. 137), 1775.
Louisville, etc. Ry. Co. v. Iron Co. (126 Ill. 294), 1130.
Lovatt v. Hamilton (5 M. & W. 639), 652.
Love v. Harvey (114 Mass. 80), 1031.
Love v. Miller (104 N. C. 582), 1236.
Love v. Ross (89 Iowa, 400), 1897.
Lovejoy v. Michels (88 Mich. 15), 207, 208, 1659.
Lovejoy v. Murray (3 Wall. 1), 156.
Lovelace v. Stewart (23 Mo. 384), 41.
Lovell v. St. Louis Mut. L. Ins. Co. (111 U. S. 264), 1090, 1097.
Low v. Austin (20 N. Y. 181), 755.
Low v. Freeman (12 Ill. 467), 41, 1168.
Low v. Pew (108 Mass. 347), 199, 200, 201.
Lowber v. Bangs (2 Wall. 728), 1145.
Lowber v. Connit (36 Wis. 176), 449.
Lowdon v. Fisk (27 S. W. R. 80), 896.
Lowe v. Harwood (139 Mass. 133), 1089.
Lowe v. Turpie (147 Ind. 652), 1755.
Lowe v. Young (59 Iowa, 364), 1031.
Lowell v. Boston & L. R. Co. (23 Pick. 24), 1001.
Lowell v. Lewis (1 Mason, 185), 834.
Lowenstein v. Bresler (109 Ala. 326), 1433.
Lowman v. Excelsior Stove Pattern Co. (104 Ala. 367), 1302, 1304.
Lowman v. Sheets (124 Ind. 417), 144.
Lowry v. Bourdieu (2 Doug. 468), 999.
Lowry v. Dillman (59 Wis. 197), 1031, 1057.
Lowry v. Fisher (2 Bush, 70), 973.
Lowry v. Mehaffy (10 Watts, 387), 425.
Lowry v. Pinson (2 Bailey, L. 324), 970.
Lowther v. Lord Lowther (13 Ves. 95), 1719.
Loyd v. Wight (20 Ga. 574), 738.
Lucas v. Campbell (88 Ill. 447), 569, 572, 600, 693.
Lucas v. Dixon (22 Q. B. Div. 357), 424.
Lucas v. Darrien (7 Taunt. 278), 1493.
Lucas v. Nichols (5 Gray, 309), 1127, 1187.
Lucas v. Wilkinson (1 H. & N. 420), 1466.
Lucesco Oil Co. v. Brewer (66 Pa. St. 351), 1163.
Lucketts v. Townsend (3 Tex. 119), 688.
Luckie v. Johnson (89 Ga. 321), 1450.
Lucy v. Monflet (5 H. & N. 229), 1402.
Ludden v. Hazen (31 Barb. 650), 597, 601.
Ludlow v. Bowne (1 Johns. 1), 733.
Ludwig v. Fuller (17 Me. 162), 380, 964, 981.
Luger Furniture Co. v. Street (6 Okl. 312), 681.
Lukens v. Aiken (174 Pa. St. 152), 1839.
Lukens v. Freiund (27 Kan. 664), 1349.
Lumley v. Corbett (18 Cal. 494), 1446.
Lund v. McCutchen (83 Iowa, 755), 210.
Lundy Furn. Co. v. White (128 Cal. 170), 569.
Lunn v. Shermer (93 N. C. 164), 1843.
Lupin v. Marie (6 Wend. 77), 906, 1482.
Lupton v. White (15 Ves. Jr. 432), 25.
Lush v. Wilkinson (5 Ves. 387), 974.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Luthy v. Waterbury (140 Ill. 664), 1265.
Lyman v. Robinson (14 Allen, 252), 236.
Lynch v. Curfman (65 Minn. 170), 1241, 1242, 1805.
Lynch v. Daggett (62 Ark. 592), 488, 492.
Lynch v. Dodge (130 Mass. 458), 91, 92.
Lynch v. Johnson (109 Mich. 640), 96, 105.
Lynch v. Murphy (171 Mass. 307), 871, 893, 936.
Lynch v. Raleigh (3 Ind. 273), 973.
Lynch v. Stott (67 N. H. 589), 1028.
Lynch v. Thompson (61 Miss. 354), 145.
Lynde v. Budd (2 Paige Ch. 191), 100, 121.
Lyne v. Wann (72 Ala. 43), 970.
Lynn v. Baltimore & Ohio R. Co. (60 Md. 404), 673.
Lynn v. Chaters (2 Ky. 521), 1719.
Lyon v. Bertram (20 How. 149), 1145, 1805.
Lyon v. Culbertson (83 Ill. 33), 1031.
Lyon v. Lenon (106 Ind. 567), 25, 29.
Lyon v. Railway Passenger Assur. Co. (46 Iowa, 631), 963.
Lyon v. Robbins (46 Ill. 276), 946.
Lyons v. Hamilton (69 Iowa, 47), 953.
Lyons v. Leahy (15 Oreg. 8), 952, 953, 956, 958, 978.
Lyons v. Stills (97 Tenn. 514), 660, 1806.
Maberly v. Sheppard (10 Bing. 99), 307, 370, 371.
Macdonald v. Longbottom (1 El. & El. 987), 437.
Mack v. Story (57 Conn. 407), 556, 601.
Mack v. Tobacco Co. (48 Neb. 397), 49.
Mackason's Appeal (42 Pa. St. 330), 956.
Mackay v. Dick (6 App. Cas. 251), 1106.
Mackellar v. Pillsbury (48 Minn. 396), 960.
Mackenzie v. Seeberger (76 Fed. R. 108), 937.
Mackey v. Swartz (60 Iowa, 710), 1380.
Mackey v. Dillinger (73 Pa. St. 85), 169.
Mackie v. Cairns (5 Cow. 547), 947.
Maclay v. Harvey (90 Ill. 525), 244, 247, 251.
Maclean v. Dunn (4 Bing. 722), 453.
Macomber v. Macomber (— R. I. —), 1423.
Macomber v. Parker (13 Pick. 175), 206, 478, 524.
Macon, etc. Ry. Co. v. Meador (65 Ga. 705), 1588.
Mactier v. Frith (6 Wend. 103), 238, 240, 244, 245, 251.
Maddox v. Miller (1 M. & S. 738), 132.
Magee v. Atkinson (2 M. & W. 442), 1264.
Magee v. Billingsley (3 Ala. 679), 731, 1208, 1320.
Magee v. Catching (33 Miss. 672), 692.
Magnes v. Sioux City Nursery Co. (14 Colo. App. 219), 1633.
Magniac v. Thompson (32 U. S. 348), 955.
Magruder v. Gage (33 Md. 344), 733, 736, 739, 740, 1181.
Mahler v. Schloss (7 Daly, 291), 691.
Mahone v. Reeves (11 Ala. 345), 916.
Mahood v. Tealza (26 La. Ann. 108), 1013, 1022.
Mahurin v. Harding (28 N. H. 128), 932.
Maine Mut. Ins. Co. v. Hodgkins (66 Me. 109), 266.
Malcomson v. Wappoo Mills (88 Fed. R. 680), 1099.
Mallory v. Willis (4 N. Y. 76), 21.
Malone v. Minn. Stone Co. (36 Minn. 325), 508.
Malsby v. Young (104 Ga. 205), 1259.
Mandel v. Butlers (21 Minn. 391), 1807.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Mandelbaum v. Gregovitch (17 Nev. 87), 1046, 1051.
Manhattan Brass Co. v. Reger (168 Pa. St. 644), 898.
Manhatten Trust Co. v. Sioux City Cable Co. (76 Fed. R. 658), 603.
Manheimer v. Harrington (20 Mo. App. 297), 906.
Manier v. Appling (112 Ala. 663), 240.
Manly v. Scoot (1 Sid. 109), 184.
Mann v. Everston (32 Md. 356), 1265, 1298.
Mann v. Glauber (96 Ga. 795), 1181.
Mann v. Stowell (3 Pin. 220), 913.
Mann v. Thompson (86 Ga. 347), 603.
Manning v. Albee (11 Allen, 520), 915, 917, 936, 937.
Manning v. Hollenbeck (27 Wis. 202), 1490.
Manny v. Glendinning (15 Wis. 50), 663, 680, 814.
Mansfield v. Converse (8 Allen, 182), 23.
Mansfield v. Gordon (144 Mass. 168), 97.
Mansfield v. Trigg (113 Mass. 350), 912, 1398.
Mansfield v. Watson (2 Iowa, 111), 90.
Manson v. Felton (13 Pick. 206), 91, 92.
Mansur, etc. Co. v. Beeman, etc. Co. (— Tex. Civ. App. —), 603.
Manton v. Moore (7 T. R. 67), 380, 381, 964, 987.
Manton v. Ray (18 R. I. 672), 1718, 1727.
Manwaring v. O'Brien (75 Minn. 542), 953.
Mapes v. Burns (72 Mo. App. 411), 909.
Marble v. Moore (102 Mass. 443), 492, 725.
Margetson v. Wright (8 Bing. 454), 1270, 1272.
Marina, The (19 Fed. R. 760), 603, 649.
Marine Bank v. Wright (48 N. Y. 1), 777.
Markham v. Jandon (41 N. Y. 235), 1787.
Markle v. Hatfield (2 Johns. 455), 1422.
Marks v. Van Eeghen (57 U. S. App. 149), 1090.
Marks v. Van Elghen (85 Fed. R. 853), 1707.
Marland v. Stanwood (101 Mass. 470), 1161.
Marlatt v. Clary (20 Ark. 251), 1794, 1798.
Marlow v. Pitfield (1 P. Wms. 558), 132.
Marmon v. Harwood (124 Ill. 104), 950, 957, 958, 959.
Marmont v. State (48 Ind. 21), 55.
Marquardt v. Flaughter (60 Iowa, 158), 139.
Marquette Mfg. Co. v. Jeffery (49 Mich. 283), 588, 597, 599.
Marsden v. Cornell (62 N. Y. 215), 992.
Marseilles Mfg. Co. v. Morgan (12 Neb. 66), 1489.
Marsh v. Hyde (3 Gray, 331), 362, 395.
Marsh v. Milligan (3 Jurist, N. S., 979), 1783.
Marsh v. Rouse (44 N. Y. 643), 358, 376, 386, 388.
Marshall v. Drawhorn (27 Ga. 275), 1272.
Marshall v. Duke (51 Ind. 62), 836, 1302.
Marshall v. Green (L. R. 1 C. P. Div. 35), 337, 361.
Marshall v. Lynn (6 M. & W. 109), 447.
Marshall v. Macon County Savings Bank (108 N. C. 639), 1697.
Marshall v. Perry (67 Me. 78), 816, 1263, 1805.
Marston v. Knight (29 Me. 341), 816, 1805.
Martin v. Adams (104 Mass. 262), 677.
Martin v. Black (21 Ala. 721), 244, 245.
Martin v. Byron (Dud. 202), 121.

References are to sections: Vol. I, §§ 1-797; Vol II, §§ 798-1850.

Martin v. Cole (104 U. S. 30), 1254.
Martin v. Duncan (47 Ill. App. 84), 964.
Martin v. Haubner (26 Canada Sup. R. 142), 428.
Martin v. Hill (12 Barb. 631), 649.
Martin v. Hurlbut (9 Minn. 142), 508.
Martin v. Jordan (60 Me. 531), 881, 937.
Martin v. Mathiot (14 S. & R. 214), 580.
Martin v. Quinn (37 Cal. 55), 1467.
Martin v. State (59 Ala. 34), 55.
Martin v. United States (2 T. B. Mon. 89), 1455.
Martindale v. Booth (3 B. & Ad. 498), 960.
Martindale v. Smith (1 Q. B. 389), 484, 1522.
Martindale v. Smith (1 Ad. & El. 389), 1682.
Martineau v. Kitching (L. R. 7 Q. B. 436), 524, 529.
Martinsburg v. Potomac R. Co. (114 U. S. 549), 673.
Martz v. Putnam (117 Ind. 392), 492, 1158.
Marvin v. Wallis (6 Ell. & B. 726), 385, 964, 1489.
Marvin Safe Co. v. Morton (48 N. J. L. 410), 599, 649.
Mary and Susan, The (1 Wheat. 25), 1181.
Maskelinski v. Wazsineski (48 N. Y. S. R. 407), 1305.
Mason v. Bond (9 Leigh, 181), 960.
Mason v. Chappell (15 Gratt. 572), 1235, 1245, 1314, 1349.
Mason v. Decker (72 N. Y. 595), 425, 449, 450, 1618, 1682.
Mason v. Smith (130 N. Y. 474), 1380.
Mason v. Vestal (88 Cal. 396), 946.
Mason v. Waite (17 Mass. 560), 17.
Mason v. Wheeler (2 N. Y. Misc. 523), 941.
Mason v. Wilson (43 Ark. 172), 1588, 1592, 1595.
Massachusetts Loan Co. v. Welch (47 Minn. 183), 1385.
Massey v. Sladen (L. R. 4 Ex. 13), 1416.
Massey v. State (74 Ind. 368), 16.
Masson v. Bovet (1 Denio, 69), 918, 1411, 1431.
Mast v. Pearce (58 Iowa, 579), 1254.
Masters v. Teller (7 Okla. 668), 964, 1187.
Masterton v. Mayor of Brooklyn (7 Hill, 61), 1704, 1709, 1710, 1765.
Materne v. Horwitz (50 N. Y. Super. Ct. 41), 996.
Materne v. Horwitz (101 N. Y. 469), 1019, 1027, 1041.
Matheny v. Mason (73 Mo. 677), 836, 1302, 1796.
Mather v. Am. Express Co. (138 Mass. 55), 1760.
Mathes v. Dobschuetz (72 Ill. 438), 130.
Mathews v. Baxter (L. R. 8 Ex. 132), 87.
Mathews v. Bliss (22 Pick. 48), 872.
Mathews v. Cowan (59 Ill. 341), 543, 545, 555.
Mathews v. Hamilton (23 Ill. 470), 1455.
Mathews v. McElroy (79 Mo. 202), 605.
Mathews v. Smith (8 Houst. 22), 599, 611.
Mathison v. Prescott (86 Ill. 493), 953.
Matlock v. Reppy (—— Ark. ——), 1843.
Matteson v. Holt (45 Vt. 336), 820, 1805.
Matthews v. American Central Ins. Co. (154 N. Y. 449), 1103.
Matthews v. Lucia (55 Vt. 308), 569, 619.
Matthews v. Parker (Oliphant, 228), 1270.
Matthews v. Reinhardt (43 Ill. App. 169), 955.
Matthewman, Case of (L. R. 3 Eq. Cas. 781), 135.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Matthiessen, etc. Co. v. McMahon (38 N. J. L. 536), 74, 355, 416.
Mattice v. Allen (3 Abb. App. Dec. 248), 416.
Mattoon v. Rice (102 Mass. 236), 1350.
Mattox v. Creig (2 Bibb, 584), 1440.
Maulding v. Steele (105 Ill. 644), 1633.
Max v. Harris (125 N. C. 345), 1840.
Maxfield v. Carpenter (84 Hun, 450), 1451.
Maxfield v. Schwartz (45 Minn. 150), 934, 1841.
Maxted v. Fowler (94 Mich. 106), 936.
Maxwell v. Brown (39 Me. 98), 365.
Maxwell v. Brown Shoe Co. (114 Ala. 304), 903, 904.
Maxwell v. Lee (34 Minn. 511), 1337, 1392.
Maxwell v. Tufts (8 N. M. 396), 599, 603.
May v. State Nat. Bank (59 Ark. 614), 974.
May v. Ward (134 Mass. 127), 437, 443.
Mayer v. Child (47 Cal. 142), 331.
Mayer v. McCreery (119 N. Y. 434), 228.
Mayer v. Taylor (69 Ala. 403), 202.
Mayhew v. Thayer (8 Gray, 172), 185.
Maynard v. Maynard (49 Vt. 297), 869, 935.
Maynard v. Render (95 Ga. 652), 1391.
Mayor of Baltimore v. Eschbach (18 Md. 282), 191.
Mayor of Baltimore v. Reynolds (20 Md. 1), 191.
McAdams v. Cates (24 Mo. 223), 869, 935.
McAfee v. Busby (69 Iowa, 328), 966.
McAleer v. Horsey (35 Md. 439), 892, 937, 1843.
McAlister v. Safley (65 Iowa, 719), 1154.
McAllister v. Smith (17 Ill. 328), 1043.
McAlpin v. Cassidy (17 Tex. 449), 1281.
McAlpin v. Lee (12 Conn. 129), 1844.
McArthur Co. v. Old Second Nat. Bank (—— Mich. ——), 779.
McBride v. Silverthorne (11 Up. Can. Q. B. 545), 210.
McCaa v. Elam Drug Co. (114 Ala. 74), 1345, 1822.
McCaffrey v. Woodin (65 N. Y. 459), 202.
McCall v. Powell (64 Ala. 254), 582.
McCandless v. Young (96 Pa. St. 289), 875.
McCarren v. McNulty (7 Gray, 139), 660, 664, 666.
McCarthy v. Henderson (138 Mass. 310), 119, 585.
McCarty v. Blevins (5 Yerg. 195), 200.
McCarty v. Gordon (16 Kan. 35), 731.
McCarver v. Nealey (1 G. Greene, 360), 1455.
McCausland v. Ralston (12 Nev. 195), 947.
McClain v. Davis (77 Ind. 419), 76.
McClellan v. Scott (24 Wis. 81), 1841.
McClelland v. Scroggin (35 Neb. 536), 30.
McClintock's Appeal (71 Pa. St. 365) 336.
McClintock v. Emick (87 Ky. 160), 1235, 1237, 1269.
McClung v. Kelley (21 Iowa, 508), 508, 1340.
McClure v. Briggs (58 Vt. 82), 666.
McClure v. Evartson (14 Lea, 495), 1461.
McClure v. Forney (107 Pa. St. 414), 960), 988.
McClure v. Jefferson (85 Wis. 208), 1380, 1392, 1395.
McClure v. Jeffrey (8 Ind. 79), 834.
McClure v. Williams (65 Ill. 390), 1255.
McComb v. Donald (82 Va. 903), 564, 583, 585, 599, 603.
McComb v. Wright (4 Johns. Ch. 659), 461.
McCombs v. McKennan (2 Watts & S. 216), 1151, 1643.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1859.

McComber v. Parker (13 Pick. 182), 519.
McConihe v. Railroad Co. (20 N. Y. 495), 755.
McConnel v. Murphy (L. R. 3 P. C. 203), 1167, 1168, 1169.
McConnell v. Brillhart (17 Ill. 354), 425.
McConnell v. Hughes (29 Wis. 537), 210, 498, 527.
McConnell v. Kitchens (20 S. C. 430), 1046, 1050.
McCord v. Laidley (87 Ga. 221), 1643.
McCorkell v. Carhoff (90 Iowa, 545), 932, 1251.
McCormick v. Basal (46 Iowa, 235), 1090, 1092.
McCormick v. Hadden (37 Ill. 370), 491, 1193.
McCormick v. Keith (8 Neb. 143), 1455.
McCormick v. Kelly (28 Minn. 135), 1272, 1285.
McCormick v. Littler (85 Ill. 62), 84.
McCormick v. Muth (49 Iowa, 536), 139.
McCormick v. Larson (45 N. Y. 265), 1390, 1392.
McCormick v. Stevenson (13 Neb. 70), 604.
McCormick v. Wood, etc. Co. (72 Ind. 518), 1455.
McCormick Harv. Mach. Co. v. Balfany (78 Minn. 370), 1674, 1688.
McCormick Mach. Co. v. Brower (94 Iowa, 144), 1806, 1812.
McCormick Harvester Co. v. Brower (88 Iowa, 607), 823, 1134, 1243, 1384.
McCormick Harv. Mach. Co. v. Callen (48 Neb. 849), 603.
McCormick Harv. Mach. Co. v. Chesrown (33 Minn. 32), 670, 1392, 1402.
McCormick Mach. Co. v. Cochran (64 Mich. 636), 668, 1402.
McCormick Mach. Co. v. Courtright (54 Neb. 18), 1803.
McCormick Harvester Co. v. Hartman (35 Neb. 629), 1384.
McCormick Harv. Mach. Co. v. Koch (8 Okl. 374), 623.
McCormick Harv. Mach. Co. v. Knoll (57 Neb. 790), 1805, 1806.
McCormick Mach. Co. v. Markert (107 Iowa, 340), 1089, 1676, 1696.
McCormick Harv. Co. v. Martin (32 Neb. 723), 1380, 1387.
McCormick Harv. Mach. Co. v. Richardson (89 Iowa, 525), 228, 242.
McCormick Harvester Co. v. Russell (86 Iowa, 556), 1242, 1384, 1403.
McCormick Co. v. Williams (99 Iowa, 601), 651.
McCoy v. Artcher (3 Barb. 323), 1302.
McCracken v. West (17 Ohio, 16), 878.
McCraw v. Gilmer (83 N. C. 162), 1481.
McCray Refrigerator Co. v. Woods (99 Mich. 269), 1254, 1311, 1314, 1349.
McCrea v. Purmort (16 Wend. 460), 449.
McCullis v. How (3 N. H. 348), 124.
McCulloch v. Eagle Ins. Co. (1 Pick. 278), 244, 247.
McCulloch v. Hutchinson (7 Watts, 434), 956.
McCulloch v. McKee (16 Pa. St. 289), 1455.
McCullough v. Baker (47 Mo. 401), 1713.
McCullough v. Porter (4 W. & S. 177), 32.
McCurdy v. Rogers (21 Wis. 197), 245.
McDaniels v. Lapham (21 Vt. 222), 1420.
McDonald v. Bervick (51 Mich. 79), 226, 234.
McDonald v. Hewett (15 Johns. 349), 41, 508.
McDonald v. Hodge (5 Hayw. 85), 1440.
McDonald v. Timber Co. (4 Pick. 47), 1820.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

McDonald Mfg. Co. v. Thomas (53 Iowa, 560), 1235, 1244, 1245, 1246.
McDonough v. Elam (1 La. 491), 8.
McDonough v. Heyman (38 Mich. 334), 1445.
McDonough v. Prescott (62 N. H. 600), 960.
McDonough v. Sutton (35 Mich. 1), 543.
McDougall v. Elliott (20 Up. Can. Q. B. 299), 714.
McElroy v. Seery (61 Md. 389), 434.
McElwee v. Metropolitan Lumber Co. (37 U. S. App. 266), 487.
McElwee v. Lumber Co. (69 Fed. R. 302), 1479, 1481, 1499, 1501, 1513, 1515, 1517, 1521, 1602, 1604.
McEwan v. Smith (2 H. of L. Cas. 309), 524, 1505, 1514, 1526.
McEwen v. Morey (60 Ill. 32), 207, 1659.
McFadden v. Mitchell (54 Cal. 628), 954.
McFadden v. Ross (126 Ind. 341), 955.
McFarland v. Farmer (42 N. H. 386), 628.
McFarland v. Newman (9 Watts, 55), 1237, 1242, 1268.
McFetridge v. Piper (40 Iowa, 627), 1582.
McGar v. Williams (26 Ala. 469), 874.
McGaughey v. Richardson (148 Mass. 608), 1248.
McGavock v. Puryear (6 Cold. 34), 1025.
McGee v. Campbell (7 Watts, 545), 947.
McGiffin v. Baird (62 N. Y. 329), 1796.
McGinnis v. Savage (29 W. Va. 362), 564.
McGlade v. McCormick (57 N. J. L. 430), 1810.
McGoldrick v. Willits (52 N. Y. 612), 149, 165, 269, 887, 912, 1411.
McGourkey v. Railway Co. (146 U. S. 536), 650.
McGovern v. Hern (153 Mass. 308), 434, 435, 436.
McGowin v. Remington (12 Pa. St. 56), 1727.
McGrath v. Donnelly (131 Pa. St. 549), 183.
McGrath v. Gegner (77 Md. 331), 1147, 1148, 1736.
McGrath v. Vanaman (53 N. J. Eq. 459), 175.
McGraw v. Fletcher (35 Mich. 104), 1251, 1259, 1348.
McGraw v. Solomon (83 Mich. 442), 923, 924.
McGregor v. Ross (96 Mich. 103), 1087.
McGrew v. Forsythe (31 Iowa, 181), 1235, 1238, 1244.
McGrew v. Produce Exchange (85 Tenn. 572), 203, 1031, 1032.
McGrew v. Thayer (24 Ind. App. 578), 25.
McGuire v. Callahan (19 Ind. 128), 87.
McGuire v. West (— Ky. App. —), 967.
McHany v. Schenk (88 Ill. 357), 1456.
McHose v. Fulmer (73 Pa. St. 365), 1743.
McIlvaine v. Harris (20 Mo. 457), 342.
McIntosh v. Hill (47 Ark. 363), 585, 599.
McIntyre v. Kline (30 Miss. 361), 754.
McIntyre v. Preston (5 Gilm. 48), 451.
McIver v. Williams (83 Wis. 570), 564.
McKaney v. Cooper (81 Ga. 679), 121.
McKanna v. Merry (61 Ill. 177), 131, 132.
McKay v. McKenna (173 Pa. St. 581), 1195.
McKee v. Bainter (52 Neb. 604), 736, 1181.
McKee v. Eaton (26 Kan. 226), 834.
McKee v. Garcelon (60 Me. 165), 966, 981, 1194.
McKee v. Jones (67 Miss. 405), 1058.
McKellar v. Pillsbury (48 Minn. 396), 711.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

McKenzie v. Culbreth (66 N. C. 531), 1419, 1420.
McKenzie v. Donnell (151 Mo. 461), 74.
McKercher v. Curtis (35 Mich. 478), 1736.
McKibbin v. Brown (1 McCarter, 13), 228.
McKibbin v. Brown (2 McCarter, 498), 228.
McKibbin v. Martin (64 Pa. St. 352), 964, 966, 967.
McKinder v. Littlejohn (4 Ired. L. 198), 1417.
McKindly v. Dunham (55 Wis. 515), 1447, 1448, 1450.
McKinnell v. Robinson (3 M. & W. 435), 1012.
McKinney v. Bradlee (117 Mass. 321), 676, 677, 678.
McKinnon v. McEwan (48 Mich. 106), 1831.
McKinnon v. McIntosh (98 N. C. 89), 1235, 1237.
McKinnon Mfg. Co. v. Alpena Fish Co. (102 Mich. 221), 1346.
McKnight v. Dunlop (5 N. Y. 537), 362, 401, 420, 1736, 1740.
McLachlin v. Brett (105 N. Y. 391), 1452.
McLane v. Johnson (43 Vt. 48), 974.
McLaughlin v. Marston (78 Wis. 670), 733, 741, 1180, 1184.
McLaughlin v. Salley (46 Mich. 219), 17.
McLay v. Perry (44 L. T., N. S., 152), 1167.
McLaughlin v. Piatti (27 Cal. 452), 714.
McLees v. Hale (10 Wend, 426), 1131.
McLennan v. Ohmen (75 Cal. 558), 1235.
McLeod v. Jones (105 Mass. 403), 626, 1191.
McLeod v. O'Neill (— Ky. —), 977.
McLoud v. Wakefield (70 Vt. 558), 200.
McLure v. Sherman (70 Fed. R. 190), 412.
McMahon v. Sloan (12 Pa. St. 229), 154.
McMarlan v. English (74 Pa. St. 296), 963, 988.
McMaster v. Emerson (— Iowa, —), 202.
McMillan v. Fox (90 Wis. 173), 1100.
McMillen v. Lee (78 Ill. 443), 186.
McMinn v. Richmonds (6 Yerg. 9), 124.
McMullen v. Williams (5 Ont. App. 518), 1255.
McMurtry v. Brown (6 Neb. 368), 451.
McNail v. Ziegler (68 Ill. 224), 1481.
McNaughton v. Haldeman (160 Pa. St. 144), 1032.
McNeal v. Braun (53 N. J. L. 617), 733, 1184.
McNeal v. Emerson (15 Gray, 384), 336, 626, 1191.
McNeil v. Tenth Nat. Bank (46 N. Y. 325), 154, 156, 157, 162.
McPhail v. Gerry (55 Vt. 174), 603.
McPherson v. Acme Lumber Co. (70 Miss. 649), 619.
McPherson v. Gale (40 Ill. 368), 708.
McQuaid v. Ross (77 Wis. 470), 446, 1254.
McQuaid v. Ross (85 Wis. 492), 1314, 1355.
McRea v. Merrifield (48 Ark. 160), 585, 588, 599, 619.
McSparran v. Neely (91 Pa. St. 17), 88.
McVeigh v. Ritenour (40 Ohio St. 107), 970.
McVicker v. May (3 Pa. St. 224), 964, 966.
Mead v. Bunn (32 N. Y. 280), 1841.
Mead v. Case (33 Barb. 202), 305.
Mead v. Degolyer (16 Wend. 632), 513, 1162.
Mead v. Gardiner (13 R. I. 257), 960.
Mead v. Noyes (44 Conn. 487), 984.
Mead v. Parker (115 Mass. 413), 437.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Meader v. Cornell (58 N. J. L. 375), 839, 1372, 1850.
Meads v. Martin (84 Mich. 306), 138.
Means v. Bank of Randall (146 U. S. 620), 792.
Means v. Williamson (37 Me. 556), 1198, 1665.
Means v. Nichols (41 Ill. 207), 1393.
Mears v. Waples (3 Houst. 581), 906.
Meason v. Phillips (Addis. 346), 1440.
Mechanical Boiler Cleaner Co. v. Kellner (62 N. J. L. 544), 293, 316, 359, 400.
Mechanics' Bank v. Farmers' Bank (60 N. Y. 40), 169.
Medbury v. Watson (6 Metc. 246), 874, 1818.
Medicke v. Sauer (61 Minn. 15), 646.
Medina v. Stoughton (1 Salk. 210), 931.
Meding v. Stoughton (1 Ld. Raym. 593), 1795.
Mee v. McNider (109 N. Y. 500), 492, 739, 741.
Meeker v. Johnson (3 Wash. 247), 549.
Meeker v. Wilson (1 Gall. 419), 987, 1201.
Megary v. Funtis (5 Sandf. Sup. Ct. 376), 1453.
Meickley v. Parsons (66 Iowa, 63), 1272, 1334, 1392.
Meiklereid v. West (1 Q. B. Div. 428), 1549.
Meincke v. Falk (55 Wis. 427), 314, 324.
Meehan v. Sharp (151 Mass. 565), 331, 380.
Melchert v. American Union Tel. Co. (11 Fed. R. 193), 1031, 1034, 1036.
Melchoir v. McCarty (31 Wis. 252), 1058.
Melledge v. Boston Iron Co. (5 Cush. 158), 1424.
Mellish v. Motteux (Peake, 115), 869.
Melvin v. Lamar Ins. Co. (80 Ill. 446), 1456.
Memphis, etc. R. Co. v. Freed (38 Ark. 614), 1532.
Menken v. Baker (40 App. Div. 608), 964.
Menkins v. Lightner (18 Ill. 282), 87.
Mentz v. Newwitter (122 N. Y. 491), 434.
Merchant v. Chapman (4 Allen, 362), 757, 1182.
Merchants' Bank v. Fraze (9 Ind. App. 161), 1311, 1354.
Merchants' Bank v. Hibbard (48 Mich. 118), 166, 709, 1507.
Merchants' Bank v. Lovejoy (84 Wis. 601), 202.
Merchants' Bank v. Thomas (69 Tex. 237), 593, 619, 632.
Merchants' Bank v. Union R. & T. Co. (69 N. Y. 373), 1556.
Merchants' Banking Co. v. Phœnix Bessemer Steel Co. (5 Ch. Div. 205), 1506, 1507, 1547, 1548.
Merchants' Exchange Bank v. McGraw (59 Fed. R. 972), 777, 779.
Merchants' Nat. Bank v. Bangs (102 Mass. 291), 502, 721, 725, 730, 736, 740, 788.
Meredith v. Meigh (2 E. & B. 364), 393, 1181, 1496.
Meres v. Ansell (3 Wil. 275), 1327.
Merriman v. Chapman (32 Conn. 146), 1320.
Merriam v. Cunningham (11 Cush. 40), 132.
Merriam v. Field (24 Wis. 640), 1254, 1255, 1260, 1340.
Merriam v. Pine City Lumber Co. (23 Minn. 314), 875.
Merriam v. Stearns (10 Cush. 257), 1057.
Merriam v. Wilkins (6 N. H. 432), 121.
Merrick v. Bradley (19 Md. 50), 1265, 1271.
Merrick v. Wiltsie (37 Minn. 41), 1817.
Merrill v. Florida Land Co. (60 Fed. R. 17), 936.

References are to sections: Vol. I, §§ 1–797; Vol II, §§ 798–1850.

Merrill v. Hunnewell (13 Pick. 213), 714.
Merrill v. Hurlburt (63 Cal. 494), 964.
Merrill v. McIntire (13 Gray, 157), 1046.
Merrill v. Nightingale (39 Wis. 247), 1344, 1817.
Merrill v. Parker (24 Me. 89), 1190, 1665.
Merrill v. Stanwood (52 Me. 65), 1437.
Merrill Chem. Co. v. Nickells (66 Mo. App. 678), 901, 914.
Merrill Furniture Co. v. Hill (87 Me. 17), 548, 549, 551, 1407.
Merriman v. Knox (99 Ala. 93), 1050.
Merriman v. McCormick Mach. Co. (96 Wis. 600), 1745.
Merritt v. Clason (12 Johns. 102), 451, 456.
Merritt v. Johnson (7 Johns. 473), 755, 759, 761.
Merritt v. Millard (4 Keyes, 208), 999.
Merritt v. Railroad Co. (16 Wend. 586), 1713.
Merritt v. Robinson (35 Ark. 483), 931.
Merry v. Green (7 Mees. & W. 623), 273.
Mers v. Franklin (68 Mo. 127), 263.
Mersey Steel & Iron Co. v. Naylor (9 App. Cas. 434), 1085, 1141, 1142, 1145, 1147, 1148.
Mershon v. Moors (76 Wis. 502), 649.
Meservey v. Gray (55 Me. 540), 1027.
Messenger v. Pratt (3 Lans. 234), 1345.
Messer v. Woodman (22 N. H. 172), 351, 386, 389.
Messmore v. N. Y. Shot Co. (40 N. Y. 422), 1763, 1764.
Methudy v. Ross (10 Mo. App. 101), 235.
Metropolitan Nat. Bank v. Benedict Co. (36 U. S. App. 604), 49.
Metropolitan Trust Co. v. Columbus S. R. Co. (93 Fed. R. 702), 603.
Meyer v. Everth (4 Camp. 22), 446, 447, 1327.
Meyer v. Green (21 Ind. App. 138), 1817.
Meyer v. Krauter (56 N. J. L. 696), 1251.
Meyer v. Richards (163 U. S. 385), 1311, 1332.
Meyer v. Stone (46 Ark. 210), 1448.
Meyer v. Thomson (16 Oreg. 194), 367, 369.
Meyers v. Turner (17 Ill. 179), 834.
Meyerstein v. Barber (L. R. 2 C. P. 37), 1194.
Miamisburg Twine Co. v. Wolhuter (71 Minn. 484), 1331.
Michael v. Bacon (49 Mo. 474), 1014, 1023.
Michael v. Curtis (60 Conn. 363), 334.
Michelstetter v. Weiner (82 Wis. 298), 391.
Mich. Cent. R. Co. v. Phillips (60 Ill. 190), 543, 600, 792, 1194.
Michigan Stove Co. v. Harris (81 Fed. R. 928), 264.
Michigan Stove Co. v. Harris (54 U. S. App. 137), 1375.
Middlebury College v. Chandler (16 Vt. 683), 130, 132.
Middlesex Co. v. Osgood (4 Gray, 447), 734, 757, 1124, 1187, 1412, 1674.
Middleton v. Stone (111 Pa. St. 589), 32.
Mighell v. Dougherty (86 Iowa, 480), 324.
Milburn v. Belloni (34 Barb. 607), 1281.
Milburn v. Belloni (39 N. Y. 53), 1823.
Milburn Mfg. Co. v. Peak (89 Tex. 209), 49.
Milburn Wagon Co. v. Nisewarner (90 Va. 714), 1240.
Mildred v. Hermano (8 App. Cas. 874), 1452.
Miles, Ex parte (15 Q. B. Div. 39), 1561.
Miles v. Edsall (7 Mont. 185), 588, 597.
Miles v. Gorton (2 Cromp. & M. 504), 1487, 1513.
Miles v. Lingerman (24 Ind. 385), 79.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Miles v. Richards (Walk. 477), 950.
Miles v. Richwine (2 Rawle, 199), 1456.
Miles v. Roberts (34 N. H. 245), 1125.
Mill Co. v. Finley (34 S. W. R. 311), 924.
Mill Dam Foundery v. Hovey (21 Pick. 417), 1075.
Millard v. Republic Bank (3 MacArthur, 54), 1461.
Millard v. Webster (54 Conn. 415), 1510, 1592.
Miller v. Ammon (145 U. S. 421), 996, 1045, 1046.
Miller v. Barber (66 N. Y. 558), 936.
Miller v. Browarsky (130 Pa. St. 372), 960.
Miller v. Buchanan (10 Ind. App. 474), 937.
Miller v. Burch (41 S. W. R. 307), 1690.
Miller v. Edmonston (8 Blackf. 891), 1455.
Miller v. Finley (26 Mich. 249), 88.
Miller v. Godfrey (2 Colo. App. 177), 1410.
Miller v. Hyde (161 Mass. 472), 58.
Miller v. Lea (25 Md. 396), 1452.
Miller v. Marckle (21 Ill. 152), 947.
Miller v. Moore (83 Ga. 684), 1275, 1334, 1392.
Miller v. McDonald (13 Wis. 673), 1265, 1271.
Miller v. Pancoast (29 N. J. L. 250), 960.
Miller v. Post (1 Allen, 434), 1045, 1046, 1050.
Miller v. Prescott (163 Mass. 12), 1080.
Miller v. Scherder (2 N. Y. 262), 1357.
Miller v. Seaman (176 Pa. St. 291), 508, 516, 741.
Miller v. Smith (26 Minn. 248), 98, 106, 112, 113.
Miller v. Smith (1 Mason, 437), 809, 964.
Miller v. Somerset Co. (— Ky. —), 1128.
Miller v. State (39 Ind. 267), 1191.
Miller v. Steen (30 Cal. 402), 569, 590.
Miller v. Stevens (100 Mass. 518), 1327.
Miller v. Van Tassel (24 Cal. 459), 1302, 1309.
Miller Brewing Co. v. De France (20 Iowa, 395), 1028.
Milliken v. Skillings (89 Mo. 180), 1805.
Milliken v. Thorndike (103 Mass. 382), 875.
Milliken v. Warren (57 Me. 46), 1515.
Millirons v. Dillon (100 Ga. 656), 1732.
Mills v. Ball (2 Bos. & Pul. 457), 1556, 1577.
Mills v. Camp (14 Conn. 219), 960.
Mills v. Graham (4 Bos. & Pul. 140), 120.
Mills v. Howeth (19 Tex. 257), 953.
Mills v. Hunt (20 Wend. 434), 350, 351.
Mills v. Thompson (72 Mo. 367), 963.
Milne v. Marwood (15 C. B. 778), 1223.
Milner v. Patton (49 Ala. 423), 1013, 1024.
Milnes v. Gery (14 Ves. 400), 213, 674.
Milwaukee Boiler Co. v. Duncan (87 Wis. 120), 1254, 1311, 1314, 1349, 1350, 1814.
Miner v. Bradley (22 Pick. 457), 912.
Miner v. Medbury (6 Wis. 295), 875, 892.
Mineral Point R. Co. v. Barron (83 Ill. 365), 1043.
Miners' Ditch Co. v. Zellerbach (37 Cal. 543), 141.
Ming v. Woolfolk (116 U. S. 599), 879, 884.
Minock v. Shortridge (21 Mich. 304), 96, 101, 121.
Minneapolis Harvester Works v. Hally (27 Minn. 495), 620, 837.
Minneapolis Threshing Co. v. Hutchins (65 Minn. 89), 1374, 1389.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Minneapolis, etc. Ry. Co. v. Columbus Rolling Mills (119 U. S. 149), 227, 229.
Minnesota Linseed Oil Co. v. Collier White Lead Co. (4 Dill. 431), 251.
Minnesota Lumber Co. v. Whitebreast Coal Co. (160 Ill. 85), 264, 1038.
Minnesota Thresher Co. v. Hanson (3 N. Dak. 81), 1380, 1384, 1395.
Minnesota Thresher Co. v. Lincoln (4 N. Dak. 410), 1396.
Minor v. Michie (Walk. 24), 1125.
Mirabita v. Imperial Ottoman Bank (3 Exch. Div. 164), 778, 780, 783, 787, 792.
Misner v. Granger (9 Ill. 69), 1340.
Mississippi R. R. Co. v. Green (9 Heisk. 588), 1099.
Missouri Pac. Ry. Co. v. Heidenheimer (82 Tex. 195), 782, 1564, 1568.
Mitchell v. Cockburn (2 H. Bl. 379), 1012, 1015.
Mitchell v. Gile (12 N. H. 390), 15, 16.
Mitchell v. La Page (Holt's N. P. 253), 268.
Mitchell v. Le Clair (165 Mass. 308), 492, 725, 1187, 1671, 1675, 1694.
Mitchell v. Read (84 N. Y. 556), 1776.
Mitchell v. Smith (1 Bin. 110), 1045.
Mitchell v. Treanor (11 Ga. 324), 184.
Mitchell v. West (55 N. Y. 107), 960.
Mitchell v. Winslow (2 Story, 644), 202.
Mittelholzer v. Tullarton (6 Ad. & El. 989), 1267.
Mixer v. Coburn (11 Metc. 559), 1311.
Mixer v. Cook (31 Me. 340), 478, 543, 549.
Mixer v. Howarth (21 Pick. 205), 305, 307, 324.
Mizell v. Burnett (4 Jones, 249), 428.
Moakes v. Nicolson (19 C. B., N. S., 290), 735, 740, 775, 779.
Mobile Bank v. Fry (69 Ala. 348), 714.
Mobile Fruit Co. v. McGuire (— Minn. —), 739.
Mobile Sav. Bank v. McDonnell (89 Ala. 434), 954.
Mody v. Gregson (L. R. 4 Ex. 49), 1216, 1329, 1331, 1340, 1342, 1346, 1377.
Moens v. Heyworth (10 M. & W. 157), 876.
Moffatt v. Green (9 Ind. 198), 714.
Moffet v. Moffet (90 Iowa, 442), 178.
Moffett-West Drug Co. v. Byrd (— Ind. Terr. —), 1774.
Moffitt-West Drug Co. v. Byrd (— U. S. App. —), 1762.
Mogan v. Turner (4 Tex. App. 192), 1664.
Mohney v. Evans (51 Pa. St. 80), 132.
Mohr v. Boston & Alb. R. Co. (106 Mass. 67), 1577.
Mohr v. Dillon (80 Ga. 572), 426.
Mohr v. Miesen (47 Minn. 228), 1031.
Mohr v. Tulip (40 Wis. 66), 69, 72.
Mohrman v. State (105 Ga. 709), 55.
Moline, etc. Co. v. Pereau (52 Neb. 577), 1382.
Moline Plow Co. v. Carson (72 Fed. R. 387), 937.
Moline Plow Co. v. Rodgers (53 Kan. 743), 49, 686, 687.
Moline Plow Co. v. Witham (52 Kan. 185), 599, 603.
Moline Scale Co. v. Beed (52 Iowa, 307), 754, 1091, 1092, 1696.
Moliter v. Robinson (40 Mich. 200), 960.
Moller v. Tuska (87 N. Y. 166), 909.
Mollett v. Wackerbarth (5 Com. B. 181), 472.
Molm v. Barton (27 Minn. 530), 960.
Monaghan v. Insurance Co. (53 Mich. 238), 97.
Monaghan v. Reid (40 Mich. 665), 1028.
Moncreif v. Wilkinson (93 Ala. 373), 935.
Money v. Fisher (92 Hun, 347), 1235, 1269.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Monroe v. Smith (79 Pa. St. 459), 975.
Monte Allegre, The (9 Wheat. 616), 1307.
Montgomery v. Forbes (148 Mass. 249), 1429.
Montgomery Furniture Co. v. Hardaway (104 Ala. 100), 188, 485, 492.
Montgomery Iron Works v. Smith (98 Ala. 644), 619, 624.
Montreal River L. Co. v. Mihills (80 Wis. 540), 875, 892.
Moody v. Aiken (50 Tex. 65), 334.
Moody v. Blake (117 Mass. 23), 119, 154, 269, 887.
Moody v. Brown (34 Me. 107), 754, 755, 1665.
Moody v. Wright (13 Metc. 29), 202.
Moog v. Benedicks (49 Ala. 512), 960.
Moog v. Hannan (93 Ala. 503), 1045, 1046.
Mooney v. Burchard (84 Ind. 285), 1794.
Mooney v. Davis (75 Mich. 188), 868, 878, 895, 896.
Mooney v. Miller (102 Mass. 217), 880, 936.
Moore v. Byrum (10 S. C. 452), 202.
Moore v. Campbell (10 Ex. 323), 447, 806.
Moore v. Copp (119 Cal. 429), 266.
Moore v. Crofton (3 Jo. & La T. 438), 804.
Moore v. Fitz (59 N. H. 572), 1428.
Moore v. Goodwin (43 Hun, 543), 666.
Moore v. Hays (12 Ind. App. 476), 391.
Moore v. Kendall (2 Pin. 99), 1053.
Moore v. Louisiana Nat. Bank (44 La. Ann. 99), 779.
Moore v. Love (57 Miss. 765), 400.
Moore v. Mountcastle (61 Mo. 424), 428, 432.
Moore v. Murdock (26 Cal. 514), 1052.
Moore v. McKinlay (5 Cal. 471), 1311.
Moore v. Perrott (2 Wash. 1), 754.
Moore v. Pierson (6 Iowa, 279), 247.
Moore v. Pollock (50 Neb. 900), 1455.
Moore v. Potter (155 N. Y. 481), 1629, 1630, 1692.
Moore v. Railway Co. (7 Lans. 39), 642.
Moore v. Recek (163 Ill. 17), 880.
Moore v. Shultz (13 Pa. St. 98), 9.
Moore v. Sibbald (24 Up. Can. Q. B. 487), 689, 690.
Moore v. Thompson (6 Mo. 353), 947.
Moore v. Williamson (44 N. J. Eq. 496), 953.
Moore (E. A.) Furn. Co. v. Sloane (166 Ill. 457), 1380, 1817.
Moorehead v. Davis (92 Ind. 303), 1794.
Moors v. Kidder (106 N. Y. 32), 776, 780.
More v. Lott (13 Nev. 376), 1539, 1571, 1595.
Morehouse v. Comstock (12 Wis. 626), 1247, 1340, 1380, 1392, 1395.
Moreland v. Myall (14 Bush, 474), 342.
Morey v. Enke (5 Minn. 392), 1125.
Morford v. Peck (46 Conn. 380), 909.
Morgan v. Bain (L. R. 10 C. P. 15), 1094, 1095.
Morgan v. Dodd (3 Colo. 551), 39.
Morgan v. Gath (3 H. & C. 748), 1161.
Morgan v. King (28 W. Va. 1), 702.
Morgan v. Miller (62 Cal. 492), 966.
Morgan v. McKee (77 Pa. St. 228), 831, 912, 1145, 1150, 1163, 1165, 1401, 1846.
Morgan v. Perkins (1 Jones' L. 171), 524.
Morgan v. Skiddy (62 N. Y. 319), 878.
Morgan-Gardner Electric Co. v. Brown (193 Pa. St. 351), 581.
Moriarity v. Stofferan (89 Ill. 528), 915.
Morin v. Martz (13 Minn. 191), 449.
Morningstar v. Cunningham (110 Ind. 328), 25.
Morissey v. Broomal (37 Neb. 766), 1032.
Moritz v. Hoffman (35 Ill. 553), 973.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Morley v. Attenborough (3 Exch. 500), 1301, 1302, 1311.
Morrill v. Blackman (42 Conn. 324), 901.
Morrill v. Kilner (113 Ill. 318), 973.
Morrill v. Wallace (9 N. H. 111), 862, 1229.
Morris v. Bowen (52 N. H. 416), 1281.
Morris v. Bradley Fertilizer Co. (64 Fed. R. 55), 1344.
Morris v. Cohn (55 Ark. 401), 1679, 1698, 1706.
Morris v. Hyde (8 Vt. 352), 960.
Morris v. Levison (1 C. P. Div. 155), 1168.
Morris v. Rexford (18 N. Y. 552), 542, 554.
Morris v. Shryock (50 Miss. 590), 526, 1571, 1592, 1595.
Morris v. Thompson (85 Ill. 16), 1302.
Morris v. Wibaux (159 Ill. 627), 1165, 1167, 1633, 1643.
Morris v. Winn (98 Ga. 482), 482.
Morris Run Coal Co. v. Barclay Coal Co. (68 Pa. St. 173), 208, 1040.
Morrison v. Adoue (76 Tex. 255), 892, 895, 901.
Morrison v. Dingley (63 Me. 553), 711, 714.
Morrison v. Oium (3 N. Dak. 76), 964.
Morrison v. Woodley (84 Ill. 192), 702, 714.
Morrissey v. Broomal (37 Neb. 766), 1031.
Morrow v. Campbell (30 Wis. 90), 527.
Morrow v. Reed (30 Wis. 81), 527, 528.
Morrow v. Turney (35 Ala. 131), 692.
Morrow Shoe Mfg. Co. v. New England Shoe Co. (60 Fed. R. 341), 892, 906, 923.
Morse v. Bellow (7 N. H. 549). 1132.
Morse v. Brackett (98 Mass. 205), 912, 916, 1398.
Morse v. Ely (154 Mass. 458), 118.
Morse v. Hutchins (102 Mass. 439), 1843.
Morse v. Moore (83 Me. 473), 346, 1156, 1334, 1335, 1393, 1395, 1811.
Morse v. Sherman (106 Mass. 430), 542, 564, 725, 1670, 1671, 1674, 1675.
Morse v. Union Stock Yards (21 Oreg. 289), 1334, 1344, 1345, 1393.
Morton v. Dean (13 Metc. 385), 439, 456, 461.
Morton v. Frick (87 Ga. 230), 603, 604.
Morton v. Ragan (5 Bush, 334), 964.
Morton v. Steward (5 Ill. App. 533), 96, 122.
Morton v. Tibbett (15 Q. B. 428), 361, 368, 369, 404.
Mosby v. Goff (21 R. I. 494), 610.
Moseby v. Gainer (10 Tex. 393), 953.
Moseley v. Shattuck (43 Iowa, 540), 599.
Moseley v. Vanhooser (6 Lea, 286), 1055.
Moses v. Mead (1 Denio, 378), 1311, 1319, 1320, 1356, 1357.
Moses v. Rogers (62 Vt. 84), 628.
Moses v. Stevens (2 Pick. 332), 109.
Moses v. Trice (21 Gratt. 556), 1423.
Moss v. Averell (10 N. Y. 449), 142.
Moss v. Exchange Bank (102 Ga. 808), 1039.
Moss v. Sweet (16 Q. B. 493), 681, 682.
Mott v. Palmer (1 N. Y. 564), 646.
Mottram v. Heyer (5 Denio, 629), 1585, 1586, 1608.
Mouthrop v. Hyett (105 Ala. 493), 1830.
Moulton v. Camroux (2 Exch. 502), 74.
Moulton v. Kershaw (59 Wis. 316), 224.
Moulton v. Warren Mfg. Co. (— Minn. —), 1718.
Mount v. Derrick (5 Hill, 455), 928.
Mount v. Scholes (120 Ill. 394), 1422.
Mt. Hope Iron Co. v. Buffington (103 Mass. 62), 490.
Mt. Leonard Milling Co. v. Insurance Co. (25 Mo. App. 259), 32.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Mountain City Mill Co. v. Butler (109 Ga. 469), 634.
Mountjoy v. Metzger (9 Phila. 10), 1090.
Mowbray v. Cady (40 Iowa, 604), 658, 679.
Mowry v. Kirk (19 Ohio St. 375), 1119, 1129.
Moyce v. Newington (L. R. 4 Q. B. Div. 32), 923, 924.
Moyer v. Lederer (50 Ill. App. 94), 894, 895.
Mucklow v. Mangles (1 Taunt. 318), 759, 761.
Mudge v. Oliver (1 Allen, 74), 267.
Mulhall v. Quinn (1 Gray, 105), 200.
Mullain v. Thomas (43 Conn. 252), 1255.
Mullen v. Wilson (44 Pa. St. 413), 973.
Muller v. Eno (14 N. Y. 597), 1395, 1805, 1818.
Mulock v. Wilson (19 Colo. 296), 973.
Mulvaney v. Rosenberger (18 Pa. St. 203), 1272.
Mumford v. Canty (50 Ill. 370), 649, 1043.
Mumford v. McPherson (1 Johns. 413), 1255.
Mumford v. Whitney (15 Wend. 380), 336.
Munro v. Gairdner (3 Brev. 31), 878.
Munson v. Washband (31 Conn. 303), 132.
Munt v. Stokes (4 Term R. 561), 999.
Munzer v. Stern (105 Mich. 523), 918.
Murch v. Wright (46 Ill. 487), 572, 600, 693.
Murchie v. Cornell (155 Mass. 60), 346, 1340.
Murdy v. Skyles (101 Iowa, 549), 139.
Murphy v. Barefield (27 Ala. 634), 688.
Murphy v. Boese (L. R. 10 Exch. 126), 460.
Murphy v. Gay (37 Mo. 535), 1235.
Murphy v. Kastner (50 N. J. Eq. 214), 1456.
Murphy v. Mulgrew (102 Cal. 547), 960, 964, 966.
Murphy v. McGraw (74 Mich. 318), 1826.
Murphy v. Railroad Co. (55 Iowa, 473), 639.
Murphy v. State (1 Ind. 366), 714.
Murray v. Brooks (41 Iowa, 45), 1281, 1285, 1288.
Murray v. Carlin (67 Ill. 286), 90.
Murray v. Doud (167 Ill. 368), 1690.
Murray v. Harway (56 N. Y. 337), 804.
Murray v. Riggs (15 Johns. 571), 963.
Murray v. Smith (4 Daly, 277), 1287.
Murry v. Ocheltree (59 Iowa, 435), 1032.
Muser v. Lissner (67 How. Pr. 509), 1411.
Muskegon Booming Co. v. Underhill (43 Mich. 629), 1482, 1600.
Muskegon Curtain Roll Co. v. Keystone Mfg. Co. (135 Pa. St. 132), 1702.
Musselman v. Cravens (47 Ind. 1), 72, 73.
Mustard v. Wohlford (15 Gratt. 329), 109.
Muston v. Gladwin (6 Q. B. 953), 1073.
Mutual L. Ins. Co. v. Watson (30 Fed. R. 653), 1031.
Myer v. Western Car Co. (102 U. S. 1), 603.
Myer v. Wheeler (65 Iowa, 390), 1148, 1150, 1320.
Myers v. Field (146 Ill. 50), 139.
Myers v. Harvey (2 Pen. & W. 478), 580.
Myers v. Meinrath (101 Mass. 366), 998, 1053.
Myers v. Trescott (59 Hun, 395), 227.
Myers v. Turner (17 Ill. 179), 834.
Mygatt v. Tarbell (78 Wis. 351), 53.
Naglebaugh v. Mining Co. (21 Ind. App. 551), 1045.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Nairn v. Ewalt (51 Kan. 355), 893.
Nance v. Nance (84 Ala. 375), 950.
Nash v. Brewster (39 Minn. 530), 711.
Nash v. Drew (5 Cush. 422), 175.
Nash v. Lull (102 Mass. 60), 834.
Nash v. Meggett (89 Wis. 486), 1423.
Nash v. Mitchell (71 N. Y. 199), 137.
Nash v. Towne (72 U. S. 689), 447, 831, 838, 1846, 1850.
Nashua Iron Co. v. Brush (50 U. S. App. 461), 1344, 1346, 1817, 1834.
Nathan v. Giles (5 Taunt. 558), 788.
National Bank v. Goodyear (90 Ga. 711), 49.
National Bank v. Hall (101 U. S. 43), 228, 229.
National Bank v. Matthews (98 U. S. 621), 1046.
National Bank v. Merchants' Bank (91 U. S. 92), 779.
National Bank v. Morris (17 App. Cas. 287), 953.
National Bank v. Peck (8 Kan. 660), 834.
National Bank v. Whitney (103 U. S. 99), 1046, 1126, 1433, 1435.
National Bank of Chicago v. Bailey (115 Mass. 228), 740, 788.
National Bank of Chambersburg v. Buckeye I. & B. Works (46 Ill. App. 526), 964.
National Bank of Commerce v. C., B. & Q. R. Co. (44 Minn. 224), 154, 545, 554, 555, 1433.
National Bank of Cairo v. Crocker (111 Mass. 163), 740, 788.
National Bank of Dakota v. Taylor (5 S. Dak. 99), 934, 942.
National Cash Reg. Co. v. Broeksmit (103 Iowa, 271), 598.
National Cash Reg. Co. v. Ison (94 Ga. 463), 175.
National Cash Reg. Co. v. Maloney (95 Iowa, 573), 603.
National Cash Reg. Co. v. Schwab (— Iowa, —), 603.
National Car L. L. Builder v. Cyclone Steam Snow Plow Co. (49 Minn. 125), 32.
National Cordage Co. v. Sims (44 Neb. 148), 49.
National Exch. Bank v. Watson (13 R. I. 91), 955.
National Furnace Co. v. Keystone Mfg. Co. (110 Ill. 427), 264.
National Horse Importing Co. v. Novak (95 Iowa, 586), 1822.
National Refining Co. v. Miller (1 S. D. 548), 254.
National Water Pur. Co. v. New Orleans Water Works Co. (48 La. Ann. 773), 1154.
Nattin v. Riley (54 Ark. 30), 606, 628, 643.
Nauman v. Ullman (102 Wis. 92), 1836.
Naumberg v. Young (44 N. J. L. 331), 1254.
Nawkins v. Berry (5 Gilm. 36), 1242.
Navassa Guano Co. v. Commercial Guano Co. (93 Ga. 92), 1167.
Naylor v. Dennie (8 Pick. 199), 1571, 1577, 1578.
Neal v. Boggan (97 Ala. 611), 549, 1407, 1482.
Neal v. Flint (88 Me. 72), 1255.
Neal v. Gillaspy (56 Ind. 451), 1307.
Neal v. Hardware Co. (122 N. C. 104), 1774.
Neal v. Shewalter (5 Ind. App. 147), 1690.
Neal v. Williams (18 Me. 391), 150, 151.
Neasham v. McNair (103 Iowa, 695), 139.
Neave v. Arntz (56 Wis. 174), 1235, 1237.
Necker v. Harvey (49 Mich. 517), 878.
Needham v. Dial (4 Tex. Civ. App. 14), 1357.
Neidefer v. Chastain (71 Ind. 363), 936.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Neil v. Cheves (1 Bailey, 537), 543.
Neiler v. Kelley (69 Pa. St. 403), 1787.
Neimeyer Lumber Co. v. Burlington R. Co. (54 Neb. 321), 733, 736, 741, 797, 1180.
Neldon v. Smith (36 N. J. L. 148), 508, 652, 1134.
Nellis v. Bradley (1 Sandf. 560), 919.
Nellis v. Clark (20 Wend. 24), 947.
Nelson v. Biggers (6 Ga. 205), 1270.
Nelson v. Brown (44 Iowa, 455), 24, 25, 28.
Nelson v. Brown (53 Iowa, 555), 25.
Nelson v. Cowing (6 Hill, 336), 1281.
Nelson v. Kilbride (113 Mich. 637), 17, 1411.
Nelson v. Kinney (93 Tenn. 428), 955.
Nelson v. Martin (105 Pa. St. 229), 820.
Nelson v. Overman (19 Ky. L. 161), 1378.
Nelson v. Railroad Co. (2 Ill. App. 180), 51, 752.
Nesbit v. Burry (25 Pa. St. 208), 514. 530, 532.
Ness v. Singer Mfg. Co. (68 Minn. 237), 178.
Netterville v. Barber (52 Miss. 168), 138.
Nettleton v. Sikes (8 Metc. 34), 334, 336, 337, 626, 1161.
New England Trust Co. v. Abbott (162 Mass. 148), 212, 1718, 1727.
New England Dressed Meat & Wool Co. v. Standard Worsted Co. (165 Mass. 328), 437, 451, 458, 714, 756, 758.
New Hampshire Ins. Co. v. Noyes (32 N. H. 345), 132.
New Haven Wire Co. Cases (57 Conn. 352), 597, 601, 780.
New Home Sewing Machine Co. v. Bothane (70 Mich. 443), 628.
New Jersey Knowles Loom Works v. Vacher (57 N. J. L. 490), 650.
New Market Co. v. Emboy (— Ky. —), 1774.
New York Sec. & Tr. Co. v. Capital Ry. Co. (77 Fed. R. 529), 646.
New York Tarter Co. v. French (154 Pa. St. 273), 749, 1183.
New York News Pub. Co. v. National Steamship Co. (148 N. Y. 39), 1442.
New Zealand Land Co. v. Ruston (5 Q. B. Div. 474), 1452.
Newark v. Essex Club (53 N. J. L. 99), 55.
Newberry v. Wall (35 N. Y. Super. Ct. 106), 464.
Newberry v. Wall (65 N. Y. 484), 464.
Newberry v. Wall (84 N. Y. 576), 463, 464.
Newby v. Rogers (40 Ind. 9), 425, 1136.
Newcomb v. Brockett (16 Mass. 161), 1097.
Newcomb v. Cabell (10 Bush, 460), 1194.
Newcomb v. Railroad Co. (115 Mass. 230), 788.
Newcomb v. De Roos (2 El. & El. 271), 262.
Newell v. Fisher (11 S. & M. 431), 87.
Newell v. Radford (L. R. 3 C. P. 52), 430, 434.
Newell v. Randall (32 Minn. 171), 868, 893.
Newell v. Smith (53 Conn. 72), 211, 276.
Newhall v. Central Pac. R. Co. (51 Cal. 345), 166, 1567.
Newhall v. Kingsbury (131 Mass. 445), 573, 588, 596, 613, 693.
Newhall v. Langdon (39 Ohio St. 87), 701, 702, 706, 1413.
Newhall v. Vargas (13 Me. 93), 1526, 1528, 1530, 1537, 1548, 1579, 1603, 1604, 1606, 1612.
Newhall v. Vargas (15 Me. 314), 1603, 1604, 1612, 1672.
Newlove v. Callaghan (86 Mich. 301), 877.
Newman v. Claflin (107 Ga. 89), 863, 895.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Newman v. Kirk (45 N. J. Eq. 677), 954.
Newsome v. Thornton (6 East, 17), 1534, 1564.
Newton v. Winchester (16 Gray, 208), 1148.
Nevada Bank v. Portland Nat. Bank (59 Fed. R. 338), 895.
Nichol v. Godts (10 Exch. 191), 1331, 1333, 1339.
Nichol v. Steger (2 Tenn. Ch. 328), 127.
Nichol v. Steger (6 Lea, 393), 118, 128.
Nicholls v. Le Feuvre (2 Bing. N. C. 83), 1571.
Nichols v. Ashton (155 Mass. 205), 32, 583, 588, 597.
Nichols v. Johnson (10 Conn. 192), 434, 437.
Nichols v. Knowles (31 Minn. 489), 1384, 1386.
Nichols v. Martin (35 Hun, 168), 1452.
Nichols v. Michael (23 N. Y. 264), 892, 906, 909, 915.
Nichols v. Morse (100 Mass. 523), 757, 1662.
Nichols v. McCarthy (53 Conn. 299), 948.
Nichols v. Nichols (61 Vt. 426), 953.
Nichols v. Patten (18 Me. 231), 947, 964.
Nichols v. Pinner (18 N. Y. 295), 906.
Nichols v. Ruggles (76 Me. 25), 603.
Nichols v. Scranton Steel Co. (137 N. Y. 487), 1090.
Nichols v. Wyman (71 Iowa, 160), 1254.
Nichols & Shepard Co. v. Snyder (78 Minn. 502), 96, 105.
Nicholson v. Bower (1 El. & El. 172), 365, 1592.
Nicholson v. Bradfield Union (L. R. 1 Q. B. 620), 1158, 1161.
Nicholson v. Pease (61 Vt. 534), 1455.
Nicholson v. Spencer (11 Ga. 607), 130.
Nicholson v. Taylor (31 Pa. St. 128), 546.
Nicholson v. Wilborn (13 Ga. 467), 127, 129, 131.
Nickerson v. Darrow (5 Allen, 419), 169.
Nickol v. Thomas (53 Ind. 42), 69, 72, 73.
Nickoll v. Ashton (2 Q. B. 298), 653, 1100.
Nield v. Burton (49 Mich. 53), 909.
Niemeyer v. Wright (75 Va. 239), 1046, 1051.
Nightingale v. Chafee (11 R. I. 609), 1423.
Nightingale v. Eiseman (121 N. Y. 288), 1400, 1461.
Nightingale v. Withington (15 Mass. 272), 186.
Nispel v. Laparle (74 Ill. 306), 138.
Niver v. Best (10 Barb. 369), 947.
Nives v. Nives (15 Ch. Div. 649), 1726.
Nixon v. Beard (111 Ind. 137), 1424.
Nixon v. Brown (57 N. H. 34), 164.
Noakes v. Morey (30 Ind. 103), 407.
Noble v. Googins (99 Mass. 231), 938.
Noble v. Hand (163 Mass. 289), 1829.
Noble v. Ward (L. R. 1 Ex. 117), 447.
Noble v. Ward (L. R. 2 Ex. 135), 806.
Noble v. Worthy (45 S. W. R. 137), 892, 893.
Noel v. Karper (53 Pa. St. 97), 87.
Noel v. Murray (13 N. Y. 167), 1425.
Noel v. Wheatly (30 Miss. 187), 1794.
Nofsinger v. Ring (71 Mo. 149), 673.
Nogales Club v. State (69 Miss. 218), 55.
Nolan v. Jackson (16 Ill. 272), 1456.
Non-Magnetic Watch Co., In re (89 Hun, 196), 755, 792.
Nordyke & Marmon Co. v. Kehlor (155 Mo. 643), 278.
Norfolk Southern R. Co. v. Barnes (104 N. C. 25), 740, 793.
Norman v. Phillips (14 M. & W. 277), 365, 393, 1181, 1496.
Normington v. Cook (2 N. Y. Sup. 423), 1161.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Norrington v. Wright (115 U. S. 188), 810, 1083, 1138, 1139, 1144, 1145, 1147, 1148, 1155, 1156, 1158, 1161, 1208, 1215, 1216.
Norris v. Blair (39 Ind. 90), 327, 439.
Norris v. Harris (15 Cal. 226), 831, 912, 1083, 1398, 1846.
Norris v. Norris (9 Dana, 317), 947.
North v. Forrest (15 Conn. 400), 331.
North v. Mendel (73 Ga. 400), 429, 434, 437.
North v. Phillips (89 Pa. St. 250), 1031, 1787.
North v. The Great Northern Ry. Co. (2 Giff. 64), 1720.
North v. Williams (120 Pa. St. 109), 626, 627.
North Penn. R. R. Co. v. Commercial Bank (123 U. S. 727), 774.
North Pac. Lum. Co. v. Kerron (5 Wash. 214), 508, 723, 781.
Northern Trust Co. v. Markell (61 Minn. 271), 1718.
Northern Central Ry. Co. v. Walworth (193 Pa. St. 207), 1727.
Northington, Ex parte (37 Ala. 496), 84.
Northwestern Cordage Co. v. Rice (5 N. Dak. 432), 1071, 1079, 1334, 1335, 1393, 1836.
Northwestern Ins. Co. v. Blankenship (94 Ind. 535), 74, 76, 79, 80.
Northwestern Iron Co. v. Meade (21 Wis. 480), 227.
Northwood v. Rennie (28 C. P. 202), 1223.
Northy v. Field (2 Esp. 613), 1577, 1586.
Norton v. Davison (1 Q. B. 401), 416.
Norton v. Doolittle (32 Conn. 405), 962.
Norton v. Dreyfuss (106 N. Y. 90), 1391, 1392.
Norton v. Gale (95 Ill. 533), 212.
Norton v. Hummel (22 Ill. App. 194), 651, 1202.
Norton v. Melick (97 Iowa, 564), 49.
Norton v. Norton (5 Cush. 524), 957.
Norton v. Pilger (30 Neb. 860), 603, 604.
Norton v. Sewall (106 Mass. 143), 878.
Norton v. Woodruff (2 N. Y. 153), 21, 22, 513.
Norwegian Plow Co. v. Clark (102 Iowa, 31), 46, 49.
Norwegian Plow Co. v. Hanthorn (71 Wis. 529), 416, 960, 965.
Noton v. Brooks (7 Hurl. & N. 499), 834.
Nounnan v. Land Co. (81 Cal. 1), 870.
Nowlen v. Colt (6 Hill. 461), 642.
Noyes v. Blodgett (58 N. H. 502), 1843.
Nutbrown v. Thornton (10 Ves. 163), 1719, 1725.
Nutter v. Wheeler (Fed. Cas. No. 10,384), 49.
Nye v. Lowry (82 Ind. 316), 451.
Nye v. Merriam (35 Vt. 438), 879.
Nye & Scheider Co. v. Snyder (56 Neb. 754), 1822.
Nysewander v. Lowman (124 Ind. 584), 1843.
Oakford v. Drake (2 Fost. & Fin. 493), 1530.
Oakley v. Morton (11 N. Y. 25), 1103.
Oakman v. Rogers (120 Mass. 214), 234.
O'Bannon v. Relf (7 Dana, 320), 1392.
Obendorf v. Union Bank (31 Md. 126), 1419.
Ober v. Carson (62 Mo. 209), 519, 527.
O'Brien v. Jones (91 N. Y. 193), 1795, 1796.
O'Brien v. Norris (16 Md. 122), 1540, 1542, 1571.
O'Brien v. Stambach (101 Iowa, 40), 975.
O'Bryan v. Fitzpatrick (48 Ark. 487), 999, 1027.
O'Bryan v. Glenn (91 Tenn. 106), 909.
Ocean Steamship Co. v. Ehrlich (88 Ga. 502), 1566, 1597.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Ockington v. Richey (41 N. H. 275), 499, 714.
O'Connell v. Hotel Co. (90 Cal. 515), 1709.
O'Conner v. Arnold (53 Ind. 203). 1455.
O'Connor v. Clark (170 Pa. St. 318), 163.
Odell v. Boston & M. R. Co. (109 Mass. 50), 527, 733, 736, 757, 1189.
O'Dell v. Lyda (46 Ohio St. 244), 26.
Odom v. Riddick (104 N. C. 512), 72, 74, 78.
O'Donnell v. Leeman (43 Me. 158), 461.
O'Donnell v. Sweeney (5 Ala. 467), 1054.
O'Donnell Brewing Co. v. Farrar (163 Ill. 471), 937.
O'Donohue v. Leggett (134 N. Y. 40), 1372.
Oester v. Sitlington (115 Mo. 247), 549.
O'Farrell v. McClure (— Kan. App. —), 492, 502.
Offutt v. Flagg (10 N. H. 46), 649.
Ogden v. Beatty (137 Pa. St. 197), 1817.
Ogg v. Shuter (1 C. P. Div. 47), 785, 787, 797.
Ogle v. Atkinson (5 Taunt. 759), 773, 1547, 1548.
Ogle v. Earl Vane (L. R. 2 Q. B. 275), 807. 1151, 1153, 1691, 1749.
Ohio Thresher Co. v. Hensel (9 Ind. App. 328), 1248, 1385.
Oinson v. Heritage (45 Ind. 73), 184.
O'Keefe v. Kellogg (15 Ill. 347), 527.
Okell v. Smith (1 Stark. N. P. 107), 1155, 1208.
Olcott v. Bolton (50 Neb. 779), 880, 1839.
Old Colony R. R. Co. v. Evans (6 Gray, 38). 142, 425, 449.
Old Dominion St. Co. v. Burckhardt (31 Gratt. 664), 908, 923.
Oldham v. Kerchener (79 N. C. 106), 1833.
Oliphant v. Markham (79 Tex. 543), 1031.
Oliver v. Fielden (4 Exch. 135), 861.
Oliver v. Houdlet (13 Mass. 237), 97.
Oliver v. Hunting (44 Ch. Div. 205), 426.
Oliver v. Moore (12 Heisk. 482), 51, 752.
Oliver v. Woodroffe (4 M. & W. 650), 124.
Ollivant v. Bayley (5 Q. B. 288), 1347, 1349.
Olmstead v. Hotailing (1 Hill, 317), 892.
Olson v. Mayer (56 Wis. 551), 1380, 1392.
Olson v. Orton (28 Minn. 36), 881.
Olson v. Sharpless (53 Minn. 91), 426, 1736.
Olvey v. Jackson (106 Ind. 286), 1424.
Olyphant v. Baker (5 Denio, 379), 493, 502, 518, 759.
Omaha Coal Co. v. Fay (37 Neb. 68), 1344.
Omoa Coal & Iron Co. v. Huntley (2 C. P. Div. 464), 1549.
O'Neal v. Day (53 Mo. App. 139), 1588, 1592.
Oneida Mfg. Society v. Lawrence (4 Cow. 440), 1320, 1322.
O'Neil v. Crain (67 Mo. 250), 438.
O'Neil v. Garrett (6 Iowa. 480), 1579.
O'Neil v. New York & S. P. Min. Co. (3 Nev. 141), 324.
O'Neil v. Vermont (144 U. S. 323), 740, 794.
O'Neil v. Walker (45 La. Ann. 609), 39.
O'Neill v. Webb (78 Mo. App. 1), 1728.
Oppenheim v. Russell (3 Bos. & Pul. 42), 1610.
Orcutt v. Nelson (1 Gray, 536), 757, 1027.
Oriental Inland Steam Co., The, v. Briggs (4 D. F. & J. 191), 228.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Orman v. Hagar (3 N. Mex. 568), 317.
Ormrod v. Huth (14 M. & W. 651), 1311.
Ormsby v. Budd (72 Iowa, 80), 1240, 1245.
Ormsby v. Dearborn (116 Mass. 386), 909.
O'Rourke v. Hadcock (114 N. Y. 541), 606, 610.
O'Rourke v. O'Rourke (43 Mich. 58), 1059.
O'Rourke v. Schultz (23 Mont. 285), 873.
Orr v. Farmers' Alliance Co. (97 Ga. 241), 1762.
Ortloff v. Klitzke (43 Minn. 154), 362.
Osborn v. Gantz (60 N. Y. 540), 546, 1222, 1223.
Osborn v. Nicholson (80 U. S. 654), 1266, 1267.
Osborn v. South Shore Lumber Co. (91 Wis. 526), 635.
Osborne v. Baker (103 Mich. 247), 1385, 1386, 1396.
Osborne v. Carpenter (37 Minn. 331), 1397.
Osborne v. Francis (38 W. Va. 312), 665, 668.
Osborne v. McQueen (67 Wis. 392), 1385, 1387, 1807.
Osborne v. Van Atten (3 Wash. Terr. 53), 1181.
Osborne Co. v. Plano Mfg. Co. (51 Neb. 502), 599, 603.
Osborne & Co. v. Bell (62 Mich. 214), 1664.
Osburn v. Farr (42 Mich. 134), 95.
Osgood v. Bauder (75 Iowa, 550), 1043, 1148.
Osgood v. Lewis (2 H. & G. 495), 1235, 1236, 1238, 1244, 1295, 1334, 1810.
Oster v. Mickley (35 Minn. 245), 1286.
Osterhout v. Shoemaker (3 Hill, 512), 69.
Oswald v. McGehee (28 Miss. 340), 1841.
Oswego Starch Co. v. Lendrum (57 Iowa, 573), 892, 901, 924, 928.
Otis v. Adams (56 N. J. L. 38), 1148.
Otis v. Cullom (92 U. S. 447), 1332.
Otis v. Spencer (102 Ill. 622), 955.
Ott v. Sweatman (166 Pa. St. 217), 580, 600.
Ottawa Bottle Co. v. Gunther (31 Fed. R. 209), 1314, 1344.
Ottman v. Monk (3 Sandf. 431), 121.
Otto v. Haloff (89 Tex. 384), 1423, 1427.
Outwater v. Dodge (7 Cow. 85), 359, 520, 523, 542.
Overton v. Brown (63 Mo. App. 49), 909.
Overton v. Phelan (2 Head, 445), 1344.
Owen v. Long (97 Wis. 78), 153, 603.
Owen v. White (5 Port. 435), 186.
Owens v. Lewis (46 Ind. 488), 336.
Owens v. Sturges (67 Ill. 366), 816, 820, 1393, 1805.
Owens v. Weedman (82 Ill. 409), 1485.
Oxendale v. Wetherell (9 B. & C. 386), 242, 513, 1161.
Oxford Iron Co. v. Spradley (51 Ala. 171), 1013.
Pacific Guano Co. v. Dawkins (57 Ala. 115), 1030.
Pacific Guano Co. v. Mullen (66 Ala. 582), 918, 1050.
Pacific Iron Works v. Long Island R. Co. (62 N. Y. 272), 756, 1162.
Pacific Iron Works v. Newhall (34 Conn. 67), 1344.
Pacific Lounge Co. v. Rudebeck (15 Wash. St. 336), 498, 499.
Pacific R. R. Co. v. Seely (45 Mo. 212), 142.
Packard v. Dunsmore (11 Cush. 282), 380.
Packard v. Getman (6 Cow. 757), 750.
Paddock v. Davenport (107 N. C. 710), 252.
Paddock v. Fletcher (42 Vt. 389), 878.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Paddock v. Strobridge (29 Vt. 470), 869, 935.
Paddon v. Taylor (44 N. Y. 371), 890.
Padfield v. Green (85 Ill. 529), 1455, 1464.
Paetz v. Stoppleman (75 Wis. 510), 937.
Page v. Bent (2 Metc. 371), 875.
Page v. Carpenter (10 N. H. 77), 525.
Page v. Edwards (64 Vt. 124), 564, 624.
Page v. Heineberg (40 Vt. 81), 142.
Page v. Parker (43 N. H. 363), 936, 1843.
Page v. Wells (37 Mich. 45), 1843.
Paige v. Barrett (151 Mass. 67), 1089.
Paine v. Devinel (53 Mo. 52), 1424.
Paine v. Fulton (34 Wis. 83), 419.
Paine v. Hall Safe Co. (64 Miss. 175), 599, 603.
Paine v. Sherwood (21 Minn. 225), 1105, 1742, 1743.
Paine v. Young (56 Md. 314), 510.
Palmateer v. Robinson (60 N. J. L. 433), 647.
Palmer's Appeal (96 Pa. St. 106), 912.
Palmer v. Banfield (86 Wis. 441), 665, 669, 1384.
Palmer v. Clark (106 Mass. 373), 212.
Palmer v. Hand (13 Johns. 434), 542, 543, 1407.
Palmer v. Hatch (46 Mo. 585), 1281, 1290.
Palmer v. Howard (72 Cal. 293), 564, 576, 578, 599.
Palmer v. Kelleher (111 Mass. 320), 1050.
Palmer v. Roath (86 Mich. 602), 1240, 1255.
Palmer v. Stephens (1 Denio, 471), 451.
Palmer v. Vanderberg (2 Wend. 193), 1131.
Pam v. Vilmar (54 How. Pr. 235), 50.
Pancake v. Campbell (44 W. Va. 82), 1089, 1706.
Pancoast v. Gowen (93 Pa. St. 66), 197.
Pangborn v. Ruemenapp (74 Mich. 572), 915.
Pangborn v. Westlake (36 Iowa, 546), 1045.
Paola Gas Co. v. Paola Glass Co. (56 Kan. 614), 1779.
Park v. Richardson (81 Wis. 399), 1395, 1807.
Park v. Richardson (91 Wis. 189), 1817.
Park v. Whitney (148 Mass. 278), 251.
Parke, etc. Co. v. Lumber Co. (101 Cal. 37), 569.
Parker, Ex parte (11 Neb. 309), 356.
Parker v. Baxter (86 N. Y. 586), 1482.
Parker v. Byrnes (1 Low. 539), 902, 1586.
Parker v. Conner (93 N. Y. 118), 953.
Parker v. Davis (8 Jones, 460), 69.
Parker v. Pettit (43 N. J. L. 512), 1097.
Parker v. Macomber (17 R. I. 674), 1106.
Parker v. Marco (76 Fed. R. 510), 77.
Parker v. Mitchell (5 N. H. 165), 386.
Parker v. Moulton (114 Mass. 99), 938.
Parker v. McIver (1 Desaus. 274), 1578.
Parker v. Palmer (4 B. & Ald. 387), 1320, 1392.
Parker v. Russell (133 Mass. 74), 1089, 1090, 1092.
Parker v. Schenck (28 Barb. 38), 305.
Parker v. Selden (69 Conn. 544), 1134.
Parker v. Wallis (5 El. & Bl. 21), 360, 373.
Parkersburg v. Brown (106 U. S. 487), 999.
Parkhurst v. Van Cortland (14 Johns. 15), 426.
Parkinson v. Lee (2 East, 314), 1311, 1316, 1329.
Parkinson v. State (14 Md. 184), 12.
Parks v. Hall (2 Pick. 211), 1515.
Parks v. Lancaster (Tex. Civ. App., 38 S. W. R. 262), 914.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Parks v. Morris Ax Co. (54 N. Y. 586), 1222, 1272, 1335, 1393, 1395.
Parks v. O'Connor (70 Tex. 377), 1251, 1391.
Parks v. Tool Co. (54 N. Y. 586), 1395.
Parlin, etc. Co. v. Harrell (8 Tex. Civ. App. 368), 593, 603, 619, 632.
Parmlee v. Catherwood (36 Mo. 479), 599.
Parnther v. Gaitskell (13 East, 432), 1459.
Parry v. Libbey (166 Mass. 112), 1197.
Parry Mfg. Co. v. Tobin (106 Wis. 286), 1805, 1844.
Parsons v. Dickinson (11 Pick. 352), 483.
Parsons v. Keys (43 Tex. 557), 123.
Parsons v. Loucks (48 N. Y. 17), 305.
Parton v. Crofts (16 C. B., N. S., 11), 468.
Parvelski v. Hargreaves (47 N. J. L. 334), 293, 316.
Pasch Case (17 Edw. IV. 2), 238.
Pash v. Weston (52 Iowa, 675), 599, 603.
Pashby v. Mandigo (42 Mich. 172), 971.
Pasley v. Freeman (3 T. R. 51), 876, 1223, 1242.
Passaic Mfg. Co. v. Hoffman (3 Daly, 495), 305.
Passinger v. Thorburn (34 N. Y. 634), 1817, 1823, 1827.
Patee v. Pelton (48 Vt. 182), 1306.
Patent Title Co. v. Stratton (89 Fed. R. 174), 942.
Patrick v. Bowman (149 U. S. 411), 247.
Patrick v. Colorado Smelting Co. (20 Colo. 268), 52.
Pattee v. Greely (13 Metc. 284), 1057.
Patten's Appeal (45 Pa. St. 151), 1628.
Patten v. Casey (57 Mo. 118), 957.
Patten v. Hood (40 Me. 457), 1423.
Patterson v. Judd (27 Mo. 563), 1168.
Patterson v. Lippincott (47 N. J. L. 457), 97.
Patterson v. Taylor (15 Fla. 340), 8.
Pattison's Appeal (61 Pa. St. 294), 336.
Pattison v. Culton (33 Ind. 240), 1562, 1563, 1614, 1615.
Patton v. Arney (95 Iowa, 664), 223.
Paul v. Baugh (85 Va. 955), 952.
Paul v. Grimm (165 Pa. St. 139), 1455.
Paul v. Hardwick (Oliphant, 81), 1270.
Paul v. Kenosha (22 Wis. 256), 838, 1849.
Paul v. Reed (52 N. H. 136), 499, 541, 543, 551, 554.
Paul v. Smith (41 Mo. App. 275), 132.
Paulson v. Hall (39 Kan. 365), 1302.
Payne v. Rodden (4 Bibb, 304), 1302, 1795.
Payne v. Stanton (59 Mo. 158), 973.
Payne v. Thompson (44 Ohio St. 192), 138.
Pawson v. Watson (Cowp. 785), 1223.
Peak v. Frost (162 Mass. 298), 1843.
Peabody v. Carrol (9 Mart. 295), 964.
Peabody v. Maguire (79 Me. 572), 546, 549, 551, 552, 554, 624.
Peabody v. Speyers (56 N. Y. 230), 331, 432.
Peace River Phosphate Co. v. Grafflin (58 Fed. R. 550), 1139.
Pearce v. Blackwell (12 Ired. 49), 933.
Pearce v. Brooks (L. R. 1 Exch. 213), 1012, 1015, 1021.
Pearce v. Foot (113 Ill. 228), 1039.
Pearce v. Foote (95 Ill. 99), 1034.
Pearl v. McDowell (3 J. J. Marsh. 658), 69, 77, 84.
Pearne v. Lisle (Ambl. 77), 1719.
Pearse v. Pettis (47 Barb. 276), 915, 917.
Pearson, Ex parte (L. R. 3 Ch. App. 442), 1181.
Pearson v. Cox (71 Tex. 246), 72, 77.
Pearson v. Dawson (El., Bl. & El. 448), 1503.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Pearson v. Quist (79 Iowa, 54), 950.
Pearson v. Mason (120 Mass. 53), 1695.
Pearson v. State (66 Miss. 510), 1029.
Pearson v. Thomason (15 Ala. 700), 1420.
Pease v. Cole (53 Conn. 53), 143.
Pease v. Gloahec (L. R. 1 Pr. Coun. 219), 148.
Pease v. Norton (6 Me. 229), 1136.
Pease v. Sabin (38 Vt. 432), 1344, 1346, 1352.
Peck v. Brewer (48 Ill. 54), 1393.
Peck v. Freese (101 Mich. 321), 254.
Peck v. Jenison (99 Mich. 326), 936.
Peck v. Vandemark (99 N. Y. 29), 426.
Peden v. Moore (1 Stew. & Port. 71), 940, 1844.
Peek v. Derry (L. R. 37 Ch. Div. 541), 876.
Peek v. Gurney (L. R. 13 Eq. Cas. 79), 878.
Peek v. Gurney (L. R. 6 H. L. 403), 868, 869, 876.
Peek v. Heim (127 Pa. St. 500), 580.
Peel v. Shepherd (58 Ga. 365), 1451.
Peeples v. Stalla (57 Ala. 53), 692.
Pelletreau v. United States Electric Light Co. (34 N. Y. Supp. 125), 305.
Peltier v. Collins (3 Wend. 459), 441, 469.
Pembroke Iron Co. v. Parsons (5 Gray, 589), 1169.
Pence v. Langdon (99 U. S. 578), 908.
Pendergast v. Reed (29 Md. 398), 937.
Peninsular Stove Co. v. Ellis (20 Ind. App. 491), 923, 924.
Penland v. Cathey (110 Ga. 431), 603.
Penley v. Bessey (87 Me. 530), 488, 485, 492.
Penn v. Bornman (102 Ill. 523), 1046.
Penn v. Smith (93 Ala. 476), 1643.
Penn v. Smith (98 Ala. 560), 1634, 1640.
Penn v. Smith (104 Ala. 445), 1760, 1763.
Pennell v. McAfferty (84 Ill. 364), 1380.
Penniman v. Hartshorn (13 Mass. 87), 41, 264, 456.
Pennock v. Coe (23 How. 117 . 202.
Pennock v. McCormick (120 Mass. 275), 40.
Pennock v. Steygles (54 Vt. 226), 1237, 1395.
Pennsylvania Co. v. Franklin Fire Ins. Co. (181 Pa. St. 40), 1727.
Pennsylvania Co. v. Holderman (69 Ind. 18), 1181.
Pennsylvania R. Co. v. American Oil Works (126 Pa. St. 485), 1610.
Pennsylvania R. Co. v. Titusville, etc. Co. (71 Pa. St. 350), 1775.
Pennsylvania Ry. Co. v. Stern (119 Pa. St. 24), 774, 782.
People v. Adelphi Club (149 N. Y. 5), 55.
People v. Andrews (115 N. Y. 427), 55.
People v. Cannon (139 N. Y. 32), 676.
People v. Commissioners (58 N. Y. 242), 755.
People v. Healy (128 Ill. 9), 893, 1666.
People v. Refining Co. (54 Hun, 354), 208.
People v. Shriver (31 Albany L. Jour. 163), 740, 794.
People v. Soule (74 Mich. 250), 55.
People v. Tweed (63 N. Y. 194), 1502.
People v. Walker (17 N. Y. 502), 1136.
People's Furn. & Carp. Co. v. Crosby (57 Neb. 282), 610.
People's Mut. Acc. Ass'n v. Smith (126 Pa. St. 317), 963.
Peoria Bank v. Railroad Co. (58 N. H. 203), 774.
Peoria Grape Sugar Co. v. Babcock (67 Fed. R. 892), 434, 437, 438.
Peoria Grape Sugar Co. v. Turney (175 Ill. 631), 1337.
Peoria Mfg. Co. v. Lyons (153 Ill. 437), 49.
Peoria & Pekin Un. Ry. Co. v. Buckley (114 Ill. 337), 545, 555.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Perdue v. Harwell (80 Ga. 150), 1272, 1273.
Perkins v. Best (94 Wis. 168), 603, 604.
Perkins v. Brown (115 Mich. 41), 839, 1846.
Perkins v. Douglas (20 Me. 317), 678.
Perkins v. Grobben (116 Mich. 172), 620.
Perkins v. Hadsell (50 Ill. 216), 449.
Perkins v. Mettler (126 Cal. 100), 566, 597.
Perkins v. McCullough (31 Oreg. 69), 159.
Perkins v. Whelan (116 Mass. 542), 1795.
Perley v. Balch (23 Pick. 283), 914, 916, 941, 1302.
Perlman v. Sartorious (162 Pa. St. 320), 1124, 1181.
Perrin v. Wilson (10 Mo. 451), 129.
Perrine v. Barnard (142 Ind. 442), 1485.
Perrine v. Cooley (39 N. J. L. 449), 1255.
Perrine v. Serrell (30 N. J. L. 454), 1223, 1807.
Perry v. Iron Co. (16 R. I. 318), 1158.
Perry v. Johnston (59 Ala. 648), 932.
Perry v. Mt. Hope Iron Co. (15 R. I. 380), 248, 249.
Perry v. Pettingill (33 N. H. 433), 636.
Perry v. Smith (22 Vt. 301), 1440, 1441, 1442.
Perry v. Young (105 N. C. 463), 599, 603, 643.
Perryman v. Wolffe (93 Ala. 290), 1031.
Persse, In re (3 Molloy, 94), 84.
Peters v. Fleming (6 M. & W. 42), 130, 132.
Peters v. Grim (149 Pa. St. 163), 99, 1032, 1034.
Peters Box Co. v. Lesh (119 Ind. 98), 149, 887.
Petersen v. Door, Sash & Lumber Co. (51 Mich. 86), 839, 1850.
Peterson v. Hornblower (33 Cal. 276), 8.
Peterson v. Tufts (34 Neb. 8), 598, 603.
Peterson v. Walter A. Wood Co. (97 Iowa, 148), 1385.
Petrie v. Hannay (3 T. R. 418), 1012, 1015.
Pettengill v. Merrill (47 Me. 109), 1665.
Pettyplace v. Groton Mfg. Co. (103 Mich. 155), 599, 624.
Phelps v. Curts (80 Ill. 109), 952, 978.
Phelps v. Holderness (56 Ark. 300), 1031.
Phelps v. Hubbard (51 Vt. 489), 1121, 1128, 1187, 1412, 1643.
Phelps v. Stillings (60 N. H. 505), 438.
Phelps v. Whitaker (37 Mich. 72), 255, 1240, 1255.
Phelps v. Worcester (11 N. H. 51), 132.
Phelps-Bigelow Windmill Co. v. Piercy (41 Kan. 763), 1254, 1384.
Phenix v. Gardner (13 Minn. 432), 40.
Phenix Ins. Co. v. Schultz (42 U. S. App. 483), 228.
Phifer v. Erwin (100 N. C. 59), 210, 498, 960.
Philadelphia Whiting Co. v. Detroit White Lead Works (58 Mich. 29), 1378.
Philadelphia Iron Co. v. Hoffman (— Pa. St. —), 1236.
Philadelphia, etc. R. Co. v. Howard (54 U. S. 307), 1704, 1709.
Philadelphia, etc. R. Co. v. Wireman (88 Pa. St. 264), 736.
Philbrick v. O'Connor (15 Oreg. 15), 954, 970, 978.
Philbrook v. Eaton (134 Mass. 398), 40, 1786.
Philips v. Green (3 A. K. Marsh. 7), 95.
Phillips v. Adair (59 Ga. 370), 953.
Phillips v. Bistolli (2 B. & Cr. 511), 278, 358, 376.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Phillips v. Green (5 T. B. Mon. 344), 109.
Phillips v. Hunnewell (4 Greenl. 376), 41.
Phillips v. Jones (12 Neb. 213), 875.
Phillips v. Lloyd (18 R. I. 99), 132.
Phillips v. Moor (71 Me. 78), 231, 260, 492, 493, 498, 536, 542.
Phillips v. Ocmulgee Mills (55 Ga. 633), 361, 711.
Phillips v. Reitz (16 Kan. 396), 960.
Phillips v. Sanchez (35 Fla. 187), 183, 185.
Philpot v. Sandwich Mfg. Co. (18 Neb. 54), 121.
Phillpotts v. Evans (5 M. & W. 475), 1088, 1090.
Phinney v. Baldwin (16 Ill. 108), 1043.
Phipps v. Buckman (30 Pa. St. 401), 879.
Phipps v. McFarlane (3 Minn. 61), 319.
Phœnix Iron Works Co. v. McEvony (47 Neb. 228), 918, 924.
Phœnix Lock Works v. Hardware Co. (9 Houst. 232), 1124, 1181.
Phœnix Milling Co. v. Anderson (78 Ill. App. 253), 908), 925.
Piazzek v. White (23 Kan. 621), 711.
Pickard v. McCormick (11 Mich. 68), 13, 936.
Pickard v. Sears (6 Adol. & El. 469), 170.
Pickering v. Bardwell (21 Wis. 562), 1642.
Pickering v. Busk (15 East, 38), 158, 161, 1446.
Pickering v. Cease (79 Ill. 328), 1034.
Pickering v. Dowson (4 Taunt. 779), 869.
Pickert v. Marston (68 Wis. 465), 1281, 1282.
Pickett v. Bullock (52 N. H. 354), 1477.
Pickett v. Cloud (1 Bailey, 362), 543.
Piedmont Club v. Commonwealth (87 Va. 541), ——.
Pierce v. Bourton (17 N. Y. Wkly. Dig. 444), 305.
Pierce v. Chipman (8 Vt. 334), 1193.
Pierce v. Cooley (56 Mich. 552), 669.
Pierce v. Drake (15 Johns. 475), 913.
Pierce v. Emery (32 N. H. 484), 141, 199.
Pierce v. George (108 Mass. 78), 646.
Pierce v. Schenck (3 Hill, 28), 21, 23.
Pierce v. Scott (37 Ark. 308), 692.
Pierce v. Tenn. Coal, I. & R. Co. (173 U. S. 1), 1090.
Pierce v. Van Dyke (6 Hill, 613), 928.
Pierrepont v. Barnard (2 Seld. 279), 336.
Pierson v. Crooks (115 N. Y. 539), 1375, 1377, 1380, 1391, 1392, 1395, 1398.
Pierson v. Spaulding (67 Mich. 640), 702.
Pierstoff v. Jorges (86 Wis. 128), 970.
Pike v. Baker (53 Ill. 163), 1181.
Pike v. Balch (38 Me. 302), 327, 461.
Pike v. Bright (29 Ala. 336), 17.
Pike v. Fay (101 Mass. 134), 1320.
Pike v. Fitzgibbon (17 Ch. Div. 454), 135.
Pike v. King (16 Iowa, 49), 1054.
Pike v. Miles (23 Wis. 164), 972.
Pike v. Vaughn (39 Wis. 499), 520, 523, 527.
Pike v. Wieting (49 Barb. 314), 902.
Pilgreen v. State (71 Ala. 368), 740, 793, 1029.
Pillen v. Erickson (—— Mich. ——), 1057.
Pineville Lumber Co. v. Thompson (46 Minn. 502), 166.
Pinkham v. Appleton (82 Me. 574), 524, 534, 543, 549.
Pinkham v. Mattox (53 N. H. 600), 360, 362, 373, 394, 397.
Pinney v. Andrus (41 Vt. 631), 1270, 1273.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Pinney v. Gleason (5 Wend. 393), 1440, 1442.
Pinney v. Railroad Co. (19 Minn. 251), 1132.
Pipkin v. Williams (57 Ark. 242), 950.
Pitcher v. Lowe (95 Ga. 423), 428.
Pitkin v. Harris (69 Mich. 133), 1455.
Pitkin v. Noyes (48 N. H. 294), 312, 345.
Pitsinowski v. Beardsley (37 Iowa, 9), 1286, 1386.
Pitt v. Acosta (18 Fla. 270), 1428.
Pitt v. Smith (3 Camp. 33), 87.
Pitts v. Beckett (13 M. & W. 743), 448.
Pitts Mfg. Co. v. Spitznogle (54 Iowa, 36), 1384.
Pittsburgh Coal Co. v. Foster (59 Pa. St. 365), 1831.
Pittsburg, etc. R. Co. v. Heck (50 Ind. 303), 1633, 1690.
Pittsburgh Locomotive Works v. Keokuk Bank (19 Fed. Cas. 785), 550.
Pixley v. Boynton (79 Ill. 351), 1032, 1034.
Plaisted v. Palmer (63 Me. 576), 1056, 1057.
Planche v. Colburn (8 Bing. 14), 1097.
Plano Mfg. Co. v. Ellis (68 Mich. 101), 663, 680, 814.
Platt v. Brand (26 Mich. 173), 1089, 1090, 1092.
Platt v. Broderick (70 Mich. 577), 668.
Platt v. Fire Extinguisher Mfg. Co. (59 Fed. R. 897), 1080.
Pleasants v. Pendleton (6 Rand. 473), 702, 711, 714.
Plevins v. Downing (1 C. P. Div. 220), 1152, 1153.
Plumb v. Campbell (129 Ill. 101). 1633.
Plummer v. Shirley (16 Ind. 380), 583.
Poconoket, The (67 Fed. R. 262), 755.
Poindexter v. McCannon (1 Dev. Eq. 373), 692.
Poland v. Brownell (131 Mass. 138), 936, 937, 1242.
Poland v. Miller (95 Ind. 387), 1344.
Polhemus v. Heiman (45 Cal. 573), 1161, 1168, 1235, 1335, 1393, 1844.
Polhill v. Walter (3 B. & A. 114), 856, 876.
Pollard v. Clayton (1 K. & J. 472), 1722, 1726.
Pollard v. Farwell (48 Mo. App. 42), 964.
Pollen v. Le Roy (30 N. Y. 549), 1624, 1629, 1637, 1641, 1643.
Pollock v. Fisher (6 N. B. 515), 714.
Pollock v. Jones (96 Ala. 492), 955.
Pollock v. Meyer (96 Ala. 172), 955.
Pollock v. Smith (49 Neb. 864), 908.
Pontifex v. Williamson (1 C. B. 75), 1106.
Poole v. Houston & T. C. Ry. Co. (58 Tex. 134), 1557, 1609.
Poor v. Oakman (104 Mass. 309), 336.
Poor v. Woodburn (25 Vt. 234), 919, 924.
Poorman v. Whitman (49 Kan. 697), 601.
Poorman v. Woodward (21 How. 266), 1455.
Pope v. Allis (115 U. S. 363), 810, 831, 839, 1155, 1208, 1846, 1850.
Pope v. Hanke (155 Ill. 617), 1043.
Pope v. Linn (50 Me. 83), 1057.
Pope v. Porter (102 N. Y. 366), 1144, 1146.
Pope v. Terre Haute Car Co. (107 N. Y. 61), 1129.
Pope v. Wilson (7 Ala. 690), 974.
Pope Iron & Metal Co. v. Best (14 Mo. App. 502), 667.
Poplett v. Stockdale (2 Car. & P. 198), 1007.
Pordage v. Cole (1 Saund. 319*b*), 404.
Porell v. Cavanaugh (69 N. H. 364), 148.
Port Carbon Co. v. Groves (68 Pa. St. 149), 1314, 1344, 1347, 1349.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Porter v. Bright (82 Pa. St. 441), 1309, 1332.
Porter v. Bucher (98 Cal. 454), 967.
Porter v. Curry (50 Ill. 319), 145.
Porter v. Gamba (43 Cal. 105), 138.
Porter v. Leyhe (67 Mo. App. 540), 921.
Porter v. Parks (49 N. Y. 564), 159.
Porter v. Pool (62 Ga. 238), 1248, 1817.
Porter v. Powell (79 Iowa, 151), 186.
Porter v. Talcott (1 Cow. 359), 16.
Portland Bank v. Stacey (4 Mass. 661), 987, 988, 1201.
Portland Bank v. Stubbs (6 Mass. 422), 987, 1201.
Posey v. Scales (55 Ind. 282), 1127, 1130.
Poska v. Stearns (56 Neb. 541), 897, 898.
Post v. Stiger (29 N. J. Eq. 554), 971.
Potsdamer v. Kruse (57 Minn. 193), 1393.
Potter v. Cowand (Meigs, 22), 483.
Potter v. Duffield (L. R. 18 Eq. 4), 439.
Potter v. Everett (40 Mo. App. 152), 336.
Potter v. Green (6 Allen, 442), 1419.
Potter v. Lee (94 Mich. 140), 1382.
Potter v. McDowell (31 Mo. 62), 957.
Potter v. Necedah Lbr. Co. (105 Wis. 25), 1842, 1843.
Potter v. Potter (65 Ill. App. 74), 937.
Potter v. Sanders (6 Hare, 1), 247.
Potter v. Springfield Milling Co. (75 Miss. 532), 175.
Potter v. Titcomb (22 Me. 300), 914.
Potts v. N. Y. etc. R. Co. (131 Mass. 455), 1610.
Potts v. Whitehead (23 N. J. Eq. 514), 228, 244, 247.
Powder Co. v. Burkhardt (97 U. S. 110), 20, 21.
Powder Live Stock Co. v. Lamb (38 Neb. 339), 356.
Powell v. Bradlee (9 Gill & J. 220), 1437.
Powell v. Chitteck (89 Iowa, 513), 1235.
Powell v. Divett (15 East, 29), 472.
Powell v. Henry (27 Ala. 612), 175, 1455.
Powell v. Horton (2 Bing. N. C. 668), 1251, 1321.
Powell v. Inman (8 Jones L. 436), 947.
Powell v. Jessop (18 C. B. 336), 329.
Powell v. Kelly (82 Ga. 1), 955.
Powell v. McAsham (28 Mo. 70), 333.
Powell v. Preston (1 Hun, 513), 597.
Powell v. Stickney (88 Ind. 310), 960.
Powell v. Wallace (44 Kan. 656), 601.
Power v. Barnham (4 Ad. & El. 473), 1240, 1242.
Powers v. Benedict (88 N. Y. 605), 909.
Powers v. Dennison (30 Vt. 752), 646.
Powers v. Harris (68 Ala. 409), 170.
Prairie Farmer Co. v. Taylor (69 Ill. 440), 682, 1393.
Pratt v. Boody (55 N. J. Eq. 175), 1032.
Pratt v. Bryant (20 Vt. 333), 642.
Pratt v. Burhans (84 Mich. 487), 601.
Pratt v. Chase (40 Me. 269), 397.
Pratt v. Collins (20 Hun, 126), 451.
Pratt v. Maynard (116 Mass. 388), 1188.
Pratt v. Miller (109 Mo. 78), 320.
Pratt v. Parkman (24 Pick. 42), 1201.
Pratt v. Paules (--- Pa. St. ---), 1236.
Pratt v. Peck (70 Wis. 620), 1380.
Pratt v. Philbrook (41 Me. 132), 879, 908.
Pray v. Burbank (10 N. H. 377), 1045.
Pray v. Mitchell (60 Me. 430), 331.
Pregnall v. Miller (21 S. C. 385), 965.
Prentice Co. v. Page (164 Mass. 276), 169.
Prentiss Tool Co. v. Schirmer (136 N. Y. 305), 624.
Prescott v. Locke (51 N. H. 94), 313, 324, 499.
Preston v. Whitney (23 Mich. 260), 629.
Preston v. Witherspoon (109 Ind. 857), 25, 165.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Prewitt v. Trimble (92 Ky. 176), 864.
Prewitt v. Wilson (103 U. S. 22), 955.
Pribble v. Kent (10 Ind. 325), 25.
Price v. Boston, etc. R. Co. (101 Mass. 542), 1181.
Price v. Furman (27 Vt. 268), 107, 109, 118, 119.
Price v. Justrobe (Harper, 111), 1440.
Price v. Malott (85 Ind. 266), 645.
Price v. Railroad Co. (50 N. Y. 213), 887.
Price v. Saunders (60 Ind. 310), 130, 132.
Price v. Wisconsin M. & F. Ins. Co. (43 Wis. 267), 169.
Prichett v. Cook (62 Pa. St. 193), 23.
Priest v. White (89 Mo. 609), 879.
Prime v. Cobb (63 Me. 200), 628.
Prince v. Boston & L. R. Co. (101 Mass. 542), 736.
Prince v. Case (10 Conn. 375), 335, 646.
Pritchard v. Smith (77 Ga. 463), 1423.
Pritchett v. Jones (4 Rawle, 260), 508.
Proctor v. Jones (2 C. & P. 532), 386, 1485.
Proctor v. McCoid (60 Iowa, 153), 879.
Proctor v. Sears (4 Allen, 95), 105, 121.
Proctor v. Spratley (78 Va. 254), 875, 1320, 1321.
Proctor v. Tilton (65 N. H. 3), 628.
Prosser v. Jones (41 Iowa, 674), 1792.
Provencher v. Brooks (64 N. H. 479), 200.
Providence Coal Co. v. Coxe (19 R. I. 380), 1148.
Public Parks Amusement Co. v. Embree-McLean Carriage Co. (64 Ark. 29), 649.
Puckett v. Reed (31 Ark. 131), 1197.
Puffer v. Lucas (112 N. C. 377), 569.
Puget Sound Mach. Co. v. Rigby (13 Wash. 264), 310.
Pugh v. Chesseldine (11 Ohio, 109), 461.
Pugh v. Moore (44 La. Ann. 209), 1332.
Pullman Palace Car Co. v. Metropolitan Street Ry. Co. (157 U. S. 94), 1384.
Pulse v. Miller (81 Ind. 190), 437.
Pulsford v. Richards (17 Beav. 87), 1223.
Purcell v. Mather (35 Ala. 570), 199, 200.
Purdy v. Huntington (42 N. Y. 334), 1453.
Purner v. Piercy (40 Md. 212), 337, 338, 344.
Pusey v. Pusey (1 Vern. 273), 1719.
Pust v. Dowie (5 B. & S. 20), 1075.
Putnam v. Dutch (8 Mass. 287), 988, 1201.
Putnam v. French (53 Vt. 402), 1449, 1450.
Putnam v. Glidden (159 Mass. 47), 1475, 1671, 1675, 1682.
Putnam v. Lamphier (36 Cal. 151), 599.
Putnam v. Tillotson (13 Metc. 517), 757, 1182.
Putney v. Day (6 N. H. 430), 336.
Pym v. Campbell (6 E. & B. 370), 448.
Pyne v. Wood (145 Mass. 558), 119, 132.
Quarles v. State (55 Ark. 10), 1052.
Quick v. Wheeler (78 N. Y. 300), 226, 253.
Quigley v. Mexico Southern Bank (80 Mo. 289), 1462.
Quimby v. Lowell (89 Me. 547), 612, 824.
Quincy v. Tilton (5 Greenl. 277), 804, 809, 964.
Quinn v. Davis (78 Pa. St. 15), 154.
Quinn v. Parke, etc. Co. (5 Wash. 276), 569, 610.
Quintard v. Bacon (99 Mass. 185), 365.
Raby v. Frank (12 Tex. Civ. App.), 12, 905.
Raeside v. Hamm (87 Iowa, 720), 935.
Raffles v. Wichelhaus (2 H. & C. 906, 272, 845, 848.
Ragland v. Wood (71 Ala. 145), 1124, 1125.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Rahn v. Deig (121 Ind. 283), 1736, 1762.
Rahter v. Bank (92 Pa. St. 393), 1051.
Rail v. Little Falls Lumber Co. (47 Minn. 422), 485, 488, 493, 502, 508, 542, 1177.
Railroad Co. v. Barrett (36 Ohio St. 448), 750.
Railroad Co. v. Burr (51 Ga. 553), 714.
Railroad Co. v. Closser (126 Ind. 348), 208.
Railroad Co. v. Freeman (61 Mo. 80), 336.
Rainwater v. Durham (2 N. & McC. 524), 132.
Ralph v. Fon Dersmith (3 Pa. Super. Ct. 618), 897.
Ralston v. Boady (20 Ga. 449), 1013.
Ramming v. Caldwell (43 Ill. App. 175), 1348.
Ramsey v. Tully (12 Ill. App. 463), 1071, 1079, 1389.
Ramsgate Hotel Co. v. Montefiore (L. R. 1 Exch. 109), 260.
Rand v. Mather (11 Cush. 1), 1003.
Randall v. Kehlor (60 Me. 37), 1281.
Randall v. Newson (2 Q. B. Div. 102), 1344, 1346, 1823.
Randall v. Raper (1 El., Bl. & El. 84), 1834.
Randall v. Sweet (1 Den. 460), 112, 132.
Randall v. Thornton (43 Me. 226), 1235.
Randle v. Stone (77 Ga. 501), 634.
Randolph Iron Co. v. Elliott (34 N. J. L. 184), 267.
Ranney v. Higby (4 Wis. 154), 739.
Raphael v. Burt (Cab. & El. 325), 1301, 1303.
Raphael v. Reinstein (154 Mass. 178), 909.
Rappleye v. International Bank (93 Ill. 396), 946.
Rasin v. Conley (58 Md. 59), 1314.
Rauber v. Sundback (1 S. Dak. 268), 58.
Rawles v. Deshler (3 Keyes, 572), 891.
Rawley, The M. K. (2 Low. Dec. 447), 750.
Rawlings v. Bean (80 Mo. 614), 878.
Rawlings v. Hunt (90 N. C. 270), 202.
Rawson v. Johnson (1 East, 203), 1188.
Rawson Mfg. Co. v. Richards (69 Wis. 643), 603.
Ray v. Light (34 Ark. 421), 273.
Ray v. Thompson (12 Cush. 281), 683.
Raymond v. Leavitt (46 Mich. 447), 208.
Rayner v. Linthorne (2 C. & P. 124), 461.
Rea v. Durkee (25 Ill. 414), 184.
Read v. Cumberland (93 Tenn. 482), 175.
Read v. Hutchinson (3 Camp. 351), 912, 1411.
Read v. Livingston (3 Johns. Ch. 481), 975.
Read v. Mosby (87 Tenn. 759), 200.
Read v. Staton (3 Hayw. 159), 1796.
Read v. Sturdevant (40 Vt. 521), 1442.
Read v. Taft (3 R. I. 175), 1013.
Reade v. Livingston (3 Johns. Ch. 481), 972, 974.
Reade v. Livingston (3 Johns. Ch. 501), 973.
Readhead v. Railway Co. (L. R. 4 Q. B. 379), 1346.
Reager v. Kendall (— Ky. App. —), 901, 905, 906.
Reber v. Schitler (141 Pa. St. 640), 658.
Rechten v. McGary (117 Ind. 132), 1181.
Rector Provision Co. v. Sauer (69 Miss. 235), 445.
Redding v. Godwin (44 Minn. 355), 1843.
Redding v. Wright (49 Minn. 322), 1841.
Redenbaugh v. Kelton (130 Mo. 558), 599, 603.
Redewill v. Gillen (4 N. Mex. 72), 599.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Redfield v. Buck (35 Conn. 328), 973, 974.
Redgrave v. Hurd (20 Ch. Div. 1), 863.
Redington v. Roberts (25 Vt. 686), 906.
Redman v. Durant, State ex rel. (53 Mo. App. 493), 964.
Redmond v. Smock (28 Md. 365), 1633.
Redpath v. Brown (71 Mich. 258), 923.
Reeus v. Holcomb (— Miss. —), 444, 445.
Red Wing Mfg. Co. v. Moe (62 Wis. 240), 1255.
Reed, In re (3 Ch. Div. 123), 269.
Reed v. Baggott (5 Ill. App. 257), 175.
Reed v. Boshears (4 Sneed, 118), —.
Reed v. Bremer (90 Tex. 144), 1022.
Reed v. Hastings (61 Ill. 266), 1235, 1237, 1242, 1254, 1255.
Reed v. Newcomb (64 Vt. 49), 138.
Reed v. Randall (29 N. Y. 358), 1340, 1380, 1390, 1391, 1392, 1395.
Reed v. Reed (70 Me. 504), 960.
Reed v. Starkey (69 Vt. 200), 588, 597.
Reed v. Upton (10 Pick. 522), 554.
Reed v. Van Ostrand (1 Wend. 424), —.
Reeder v. Machen (57 Md. 56), 714.
Reeder v. Moore (95 Mich. 594), 928.
Reeder Bros. Shoe Co. v. Prylinski (102 Mich. 468), 906, 922.
Rees v. Mitchell (41 Ill. 368), 960.
Reese v. Bates (94 Va. 321), 1235, 1242, 1281, 1282, 1284.
Reese v. Miles (99 Tenn. 398), 1817, 1820, 1833, 1834.
Reese River Mining Co. v. Smith (L. R. 4 H. L. 64), 857, 876.
Reeves v. Corning (51 Fed. R. 774), 871, 872, 934.
Reeves v. Corrigan (3 N. Dak. 415), 1254.
Reeves v. Sebern (16 Iowa, 234), 38.
Reggio v. Braggiotti (7 Cush. 166), 1798, 1817, 1834, 1843.
Regier v. Craver (54 Neb. 507), 603.
Reherd v. Clem (86 Va. 374), 29.
Reichwald v. Commercial Hotel Co. (106 Ill. 439), 141.
Reid v. Diamond Plate Glass Co. (54 U. S. App. 619), 438.
Reid v. Cowduroy (79 Iowa, 169), 892, 901, 906.
Reid v. Field (83 Va. 26), 1374.
Reid v. Hoskins (4 E. & B. 979), 1097.
Reid v. Hoskins (5 El. & Bl. 729), 1088.
Reid v. Hoskins (6 El. & Bl. 953), 1089.
Reid v. Kempe (74 Minn. 474), 896.
Reid v. Lloyd (67 Mo. App. 513), 901.
Reiger v. Worth (127 N. C. 230), 1823.
Reinhart v. Gregg (8 Wash. 191), 390.
Remick v. Sandford (120 Mass. 309), 358, 359, 369, 372, 395, 403.
Remick v. Sandford (118 Mass. 102), 446, 464, 465.
Renninger v. Spatz (128 Pa. St. 524), 952, 960, 964, 988.
Renoe v. Western Milling Co. (53 Kan. 255), 603.
Renselaer, etc. R. R. Co. v. Davis (43 N. Y. 137), 142.
Rentch v. Long (27 Md. 188), 323.
Restad v. Engemoend (65 Minn. 148), 499, 508.
Reticker v. Katzenstein (26 Ill. App. 33), 906.
Reuter v. Sala (4 C. P. D. 239), 1141, 1145, 1161, 1168.
Revercomb v. Duker (74 Mo. App. 570), 964.
Rew v. Payne (1 C. P. D. 47), 787.
Rex v. Whitnash (7 B. & C. 596), 1052.
Reynell v. Sprye (1 De Gex, M. & G. 660), 1001.
Reynolds v. Boston & Me. R. Co. (43 N. H. 580), 1537, 1542, 1556, 1606.
Reynolds v. Continental Ins. Co. (36 Mich. 131), 1445.

References are to sections; Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Reynolds v. Crawfordsville Nat. Bank (112 U. S. 405), 1046.
Reynolds v. Ferree (86 Ill. 570), 1455.
Reynolds v. Franklin (44 Minn. 30), 1843.
Reynolds v. McCurry (100 Ill. 356), 109.
Reynolds v. Palmer (21 Fed. R. 433), 1298, 1320.
Reynolds v. Sweetzer (15 Gray, 78), 184.
Reynolds v. Waller (1 Wash. 164), 87.
Rhine v. Blake (59 Tex. 240), 1455.
Rhines v. Phelps (3 Gilm. 455), 960.
Rhoades v. Castner (12 Allen, 132), 429.
Rhoades v. Fuller (139 Mo. 179), 74.
Rhode v. Thwaites (6 B. & C. 388), 729.
Rhode Island Loco. Works v. Lumber Co. (91 Ga. 639), 599, 603.
Rhodes v. Belchee (36 Oreg. 141), 1453.
Rhodes v. Cotton (90 Me. 453), 1134.
Rhodes v. Forwood (L. R. 1 App. Cas. 256), 263.
Rice v. Boyer (108 Ind. 472), 95, 98, 107, 116.
Rice v. Butler (160 N. Y. 578), 119, 132.
Rice v. Churchill (2 Denio, 145), 734, 1124.
Rice v. Codman (1 Allen, 377), 1262, 1337.
Rice v. Cutler (17 Wis. 351), 1507.
Rice v. Forsyth (41 Md. 389), 1311, 1348.
Rice v. Glass Co. (88 Ill. App. 407), 1633.
Rice v. Groffmann (56 Mo. 434), ——.
Rice v. Manley (66 N. Y. 82), 1643.
Rice v. Nixon (97 Ind. 97), 25.
Rice v. Western Fuse Co. (64 Ill. App. 603), 207.
Richards v. Borroughs (62 Mich. 117), 361.
Richards v. Fuller (37 Mich. 161), 255.
Richards v. Green (23 N. J. Eq. 536), 449.
Richards v. Porter (6 B. & C. 437), 427.
Richards v. Railroad Co. (44 N. H. 136), 141.
Richards v. Schreiber (98 Iowa, 422), 619.
Richards v. Shaw (67 Ill. 222), 831, 1162, 1846.
Richardson v. Brown (1 Bing. 344), 1251, 1276.
Richardson v. Buhl (77 Mich. 632), 208.
Richardson v. Coffman (87 Iowa, 121), 1235, 1242.
Richardson v. Cooper (25 Me. 450), 1151.
Richardson v. Dunn (2 Q. B. 222), 242, 746.
Richardson v. Goss (3 Bos. & Pul. 119), 1577.
Richardson v. Grandy (49 Vt. 22), 1237, 1811.
Richardson v. Great Western Mfg. Co. (3 Kan. App. 445), 594.
Richardson v. Hooper (13 Pick. 446), 804.
Richardson v. Johnson (1 La. Ann. 389), 1272.
Richardson v. Marshall County (100 Tenn. 346), 1303, 1332.
Richardson v. Mason (53 Barb. 601), 1266.
Richardson v. Nathan (167 Pa. St. 513), 792.
Richardson v. Noble (77 Me. 390), 937.
Richardson v. Olmstead (74 Ill. 213), 21.
Richardson v. Plate (93 Ind. 423), 79.
Richardson v. Rardin (88 Ill. 124), 960.
Richardson v. Strong (13 Ired. L. 106), 84.
Richardson Drug Co. v. Teasdall (52 Neb. 698), 613, 636, 637, 642.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Richardson Dry Goods Co. v. Goodkind (22 Mont. 462), 896, 898.
Richart v. People (19 Ill. 85), 55.
Richey v. Daemicke (86 Mich. 647), 1240.
Richmond v. Crudup (Meigs, 581), 960.
Richmond v. Foss (77 Me. 590), 1050.
Richmond v. Mississippi Mills (52 Ark. 30), 892, 894.
Richmond v. Moore (107 Ill. 429), 1052.
Richter v. Frank (41 Fed. R. 859), 1037.
Rickard v. Moore (38 L. T. 841), 369.
Ricker v. Cross (5 N. H. 571), 483, 981, 987, 1201.
Ricker v. Ham (14 Mass. 137), 953.
Ricketts v. Sisson (9 Dana, 358), 1350, 1352.
Rickey v. Ten Broeck (63 Mo. 563), 401, 1638.
Riddle v. Brown (20 Ala. 412), 336.
Riddle v. Varnum (20 Pick. 280), 499, 502, 518, 519, 524.
Riddle v. Webb (110 Ala. 599), 1268, 1395.
Rider v. Kelley (32 Vt. 268), 754, 763.
Ridgeway v. Herbert (150 Mo. 606), 109.
Ridgeway v. Kennedy (52 Mo. 24), 599.
Ridgeway v. Underwood (4 Wash. C. C. 129), 973.
Ridgeway v. Wharton (6 H. L. Cas. 238), 235, 426.
Ridgley v. Mooney (16 Ind. App. 362), 1633, 1690.
Riendeau v. Bullock (147 N. Y. 269), 1074.
Rigg v. Reading, etc. St. Ry. Co. (191 Pa. St. 298), 1718, 1728, 1733.
Riggs v. Thorpe (67 Minn. 217), 875.
Riggan v. Greene (80 N. C. 236), 72, 77.
Riggins v. Railroad Co. (73 Mo. 598), 264.
Rigney v. Monette (47 La. Ann. 648), 1778.
Riley v. Farnsworth (116 Mass. 223), 428, 443.
Riley v. Hale (158 Mass. 240), 1089.
Riley v. Mallory (33 Conn. 201), 109, 116, 119.
Riley v. Vaughan (116 Mo. 169), 953.
Rinchler v. Jeliffe (9 Daly, 469), 1357.
Rindskopf v. De Ruyter (39 Mich. 1), 365, 731.
Rinehart v. Olwine (5 W. & S. 162), 1664.
Riordan v. Doty (50 S. C. 537), 1039.
Ripley v. Ætna Ins. Co. (30 N. Y. 136), 1070.
Ripley v. Case (78 Mich. 126), 839, 932, 940, 1850.
Rising v. Patterson (5 Whart. 316), 1420.
Risinger v. Cheney (7 Ill. 84), 1106.
Ritchie v. Atkinson (10 East, 295), 1163.
Ritter v. Singmaster (73 Pa. St. 400), 1422.
Rivers v. Gregg (5 Rich. Eq. 274), 127, 129, 130, 132.
Riverside Iron Works v. Hall (64 Mich. 165), 1423, 1425, 1431.
Robbins v. Chipman (1 Utah, 335), 702.
Robbins v. Chipman (2 Utah, 347), 702.
Robbins v. Clark (129 Mass. 145), 673.
Robbins v. Eaton (10 N. H. 562), 109, 121.
Robbins v. Oldham (1 Duvall, 28), 964.
Robbins v. Phillips (68 Mo. 100), 599, 624.
Roberts v. Applegate (153 Ill. 210), 1242, 1243.
Roberts v. Beatty (2 Pen. & Watts, 67), 41.
Roberts v. Brett (11 H. L. Cas. 337), 1134.
Roberts v. Burr (—— Cal. ——), 964.
Roberts v. Fisher (43 N. Y. 159), 1430.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Roberts v. French (153 Mass. 60), 882, 938.
Roberts v. Hawn (20 Colo. 77), 964.
Roberts v. Hunt (61 Vt. 612), 599, 603.
Roberts v. Jenkins (21 N. H. 116), 1270.
Roberts v. Radcliff (35 Kan. 502), 964.
Roberts v. Ward (4 McLean, 565), 834.
Roberts v. Wiggin (1 N. H. 73), 109.
Robertson v. Clarkson (9 B. Mon. 507), 1272.
Robertson v. Hays (83 Ala. 290), 1045.
Robertson v. Hunt (77 Tex. 321), 492.
Robertson v. Strickland (28 Up. Can. Q. B. 221), 520.
Robertson v. Vaughn (5 Sandf. 1), 305, 307.
Robeson v. French (12 Metc. 24), 1056.
Robinson v. Anderson (106 Ind. 152), 1455.
Robinson v. Batchelder (4 N. H. 40), 1151.
Robinson v. Berkey (100 Iowa, 136), 1384, 1813.
Robinson v. Berry (93 Me. 320), 120.
Robinson v. Bland (2 Burr. 1077), 1004.
Robinson v. Brooks (40 Fed. R. 525), 1083, 1134.
Robinson v. Chapline (9 Iowa, 91), 599.
Robinson v. Chemical Bank (86 N. Y. 404), 1461.
Robinson, Constable, v. Cooper (1 Hill, 286), 1307.
Robinson v. Fairbanks (81 Ala. 132), 676.
Robinson v. Green (3 Metc. 159), 1004.
Robinson v. Harvey (82 Ill. 58), 1235, 1237.
Robinson v. Holt (39 N. H. 557), 642.
Robinson v. Hyer (35 Fla. 544), 1763.
Robinson v. Levi (81 Ala. 134), 148, 878, 895, 903, 904.
Robinson v. Mollett (L. R. 7 H. L. 802), 467.
Robinson v. Morgan (65 Vt. 37), 1474, 1476, 1500, 1502, 1521.
Robinson v. McNeill (51 Ill. 225), 1254.
Robinson v. Noble (8 Pet. 181), 1167.
Robinson v. Page (3 Russ. 114), 804.
Robinson v. Pogue (86 Ala. 257), 788, 809, 1182.
Robinson v. Stewart (10 N. Y. 189), 957, 975.
Robinson v. Stuart (68 Me. 61), 1194.
Robinson v. Weeks (56 Me. 102), 122.
Robinson Mach. Works v. Chandler (56 Ind. 575), 1347.
Robinson Mercantile Co. v. Thomson (74 Miss. 847), 187.
Robison v. Tyson (46 Pa. St. 286), 1130.
Robson v. Bohn (27 Minn. 333), 1148.
Robson v. Drummond (2 B. & Ad. 303), 1097.
Robson v. Miller (12 S. C. 586), 1240, 1251, 1344.
Robson v. Watts (11 Tex. 764), 1455.
Roby v. West (4 N. H. 285), 1048.
Rocco v. Frapoli (50 Neb. 665), 996.
Rocheblave v. Potter (1 Mo. 561), 960.
Rochester Distilling Co. v. Rosey (142 N. Y. 570), 202.
Rochester Oil Co. v. Hughey (56 Pa. St. 322), 728, 735, 750.
Rockafeller v. Merritt (40 U. S. App. 666), 1843.
Rockafellow v. Baker (41 Pa. St. 319), 880.
Rockford, etc. R. Co. v. Lent (63 Ill. 288), 1161.
Rock Island Plow Co. v. Meredith (107 Iowa, 498), 1387.
Rockwell v. Humphrey (57 Wis. 410), 578.
Rodee v. Wade (47 Barb. 53), 41, 711.
Rodger v. Comptoir L'Escompte (L. R. 2 Pr. Coun. 393), 1565.
Rodgers v. Bachman (109 Cal. 552), 564, 588, 597, 599, 614, 620, 625.
Rodgers v. Bass (46 Tex. 505), 1455.
Rodgers v. Jones (129 Mass. 420), 377, 386, 392.
Rodgers v. Niles (11 Ohio St. 48), 1317, 1340, 1344, 1346.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Rodgers v. Perrault (41 Kan. 385), 1254, 1255.
Rodick v. Coburn (68 Me. 170), 1455.
Rodliff v. Dallinger (141 Mass. 1), 149, 239, 887.
Rodman v. Guilford (112 Mass. 405), 757, 1162.
Rodman v. Thalheimer (75 Pa. St. 232), 904, 906.
Rodwell v. Phillips (9 M. & W. 501), 343.
Roe v. Bacheldor (41 Wis. 360), 1260.
Roebling Son's Co. v. Lock Stitch Fence Co. (130 Ill. 660), 1088, 1089, 1090, 1633, 1643, 1707.
Roehm v. Horst (178 U. S. 1), 1089, 1706, 1753.
Rogers v. Abbott (128 Mass. 102), 971.
Rogers v. Blackwell (49 Mich. 192), 72, 79.
Rogers v. Burr (105 Ga. 432), 331.
Rogers v. Cox (96 Ind. 157), 334, 645.
Rogers v. Evans (3 Ind. 574), 952.
Rogers v. Hanson (35 Iowa, 283), 816, 1805.
Rogers v. Highland (69 Iowa, 504), 636.
Rogers v. Humphrey (39 Me. 382), 1050.
Rogers v. Niles (11 Ohio St. 48), 1314.
Rogers v. Rogers (139 Mass. 440), 806.
Rogers v. Thomas (20 Conn. 53), 1540, 1542, 1612.
Rogers v. Van Hoesen (12 Johns. 221), 1127, 1130.
Rogers v. Walker (6 Pa. St. 371), 68, 77.
Rogers v. Whitehouse (71 Me. 222), 556, 597, 601.
Rogers v. Woodruff (23 Ohio St. 632), 652.
Rogers Locomotive Works v. Lewis (4 Dill. 158), 603.
Roget v. Merritt (2 Caines, 117), 1430.
Rohde v. Thwaites (6 B. & C. 388), 759.
Rohn v. Dennis (109 Pa. St. 504), 564.
Roland v. Gundy (5 Ohio, 202), 269.
Romaine v. Van Allen (26 N. Y. 307), 1787.
Roman v. Bressler (49 Neb. 368), 361, 1391.
Romeo v. Martucci (72 Conn. 504), 601.
Romero v. Newman (50 La. Ann. 80), 1103.
Rommel v. Wingate (103 Mass. 327), 746, 1134, 1158.
Rondeau v. Wyatt (2 H. Bl. 63), 297, 298, 299.
Rood v. Welch (28 Conn. 157), 960.
Roof v. Pulley Co. (36 Fla. 284), 599.
Roof v. Stafford (7 Cow. 179), 107, 109.
Roome v. Jenning (2 N. Y. Misc. R. 257), 910.
Root v. French (13 Wend. 570), 923.
Roper v. Johnson (8 Com. Pl. 167), 1711, 1746, 1753.
Ropes v. Allen (11 Allen, 591), 991.
Ropes v. Lane (9 Allen, 502), 714, 725, 964.
Roquemore v. Alloway (33 Tex. 461), 1024.
Rose v. Beatie (2 Nott & McC. 538), 1322.
Rose v. Brown (11 W. Va. 122), 973.
Rose v. Colter (76 Ind. 590), 960.
Rose v. Mitchell (6 Colo. 102), 1013.
Rose v. Story (1 Pa. St. 190), 32, 580.
Roseman v. Canovan (43 Cal. 110), 881, 1272.
Rosenbaum v. Weeden (18 Gratt. 785), 1633, 1637, 1640, 1642, 1682.
Rosenblatt v. Townsley (73 Mo. 536), 1055.
Rosenfield v. Swenson (45 Minn. 190), 1382, 1392.
Rosenthal v. Kahn (19 Oreg. 571), 520, 673.
Rosenthal v. Risley (11 Iowa, 541), 714.
Rosevear China Clay Co., Ex parte (11 Ch. Div. 560), 741, 1550, 1561.
Ross v. Allen (45 Kan. 231), 434.

References are to sections: Vol. I, §§ 1 797; Vol. II, §§ 798-1850.

Ross v. Draper (55 Vt. 404), 964.
Ross v. Miner (67 Mich. 410), 902, 904, 905.
Ross v. McDuffie (91 Ga. 120), 569.
Ross v. Welch (11 Gray, 235), 1199.
Ross-Mehan Foundry Co. v. Ice Co. (72 Miss. 608), 592.
Rossiter v. Miller (3 App. Cas. 1124), 235, 434, 435.
Rossman v. McFarland (9 Ohio St. 369), 1044.
Roswald v. Hobbie (85 Ala. 73), 955.
Roth v. Palmer (27 Barb. 652), 912, 1411.
Roth & Co. v. Taysen & Co. (73 L. T. R. 628), 1707.
Rothwell v. Alves (60 Ill. App. 156), 492.
Roundtree v. Baker (52 Ill. 241), 1043.
Rourke v. Bullens (8 Gray, 549), 508.
Routledge v. Grant (4 Bing. 653), 228, 252, 253.
Rovegno v. Defferari (40 Cal. 459), 278.
Rowe v. Blanchard (18 Wis. 441), 834.
Rowe v. Osborne (1 Stark. 140), 468.
Rowe v. Pickford (8 Taunt. 83), 1577.
Rowe v. Sharpe (51 Pa. St. 26), 32, 580, 600.
Rowland v. Shelton (25 Ala. 217), 1794, 1798.
Rowley v. Bigelow (12 Pick. 307), 148, 902, 905, 923, 1523, 1548, 1551, 1612.
Royal v. Aultman-Taylor Co. (116 Ind. 424), 1073.
Rozier v. Williams (92 Ill. 187), 960.
Rubber Co. v. Adams (23 Pick. 256), 880.
Rubin v. Sturtevant (51 U. S. App. 286), 1395, 1398, 1802.
Ruck v. Hatfield (5 B. & Ald. 632), 774, 1497.
Rucker v. Donovan (13 Kan. 251), 1531, 1571, 1579, 1606, 1608, 1612.
Ruckman v. Bergholz (37 N. J. L. 437), 1046, 1051.
Rudy v. Austin (56 Ark. 73), 973, 974.
Ruff v. Jarrett (94 Ill. 475), 1255.
Ruff v. Rinaldo (55 N. Y. 664), 1079, 1389.
Rugg v. Minett (11 East, 210), 515, 1413.
Rugg v. Moore (110 Pa. St. 236), 1148, 1163.
Ruggles v. First Nat. Bank (43 Mich. 192), 342.
Rumpf v. Barto (10 Wash. 382), 30, 160.
Rumsey v. Berry (65 Me. 570), 1031, 1032.
Rundlett v. Weeber (3 Gray, 263), 1004.
Ruohs v. Third Nat. Bank (94 Tenn. 57), 1303, 1332.
Rupley v. Daggett (74 Ill. 351), 278.
Rushing v. Clancy (92 Ga. 769), 138.
Rusk v. Fenton (14 Bush, 490), 77.
Russell, Ex parte (19 Ch. D. 588), 974.
Russell v. Bandeira (13 C. B. 149), 1106.
Russell v. Carrington (42 N. Y. 118), 711.
Russell v. Long (52 Iowa, 250), 139.
Russell v. Meyers (32 Mich. 522), 336.
Russell v. Minor (22 Wend. 659), 546, 1437.
Russell v. Murdock (79 Iowa, 101), 1057, 1384.
Russell v. Nicoll (3 Wend. 112), 513, 652.
Russell v. O'Brien (127 Mass. 349), 1193, 1194.
Russell v. Richards (10 Me. 429) 335, 336.
Russell v. Savings Bank (39 Mich. 671), 137.
Russell v. Southard (12 How. 139), 40.
Russell & Co. v. Lilienthal (36 Oreg. 105), 1398.
Rutan v. Hinchman (30 N. J. L. 255), 328.
Rutan v. Ludlam (29 N. J. L. 398), 1817, 1818.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1870.

Ruthrauff v. Hagenbuch (58 Pa. St. 103), 485, 502.
Ryan v. Brant (42 Ill. 78), 915.
Ryan v. Hall (13 Metc. 520), 446.
Ryan v. McLane (91 Md. 175), 1727.
Ryan v. Ryan (97 Ill. 38), 947.
Ryan v. Smith (165 Mass. 303), 132.
Ryan v. Ulmer (108 Pa. St. 332), 1245, 1298, 1334, 1336.
Ryan v. Wayson (108 Mich. 519), 595, 605, 613, 630.
Ryder v. Cooley (58 Conn. 367), 565.
Ryder v. Hathaway (21 Pick. 298), 642.
Ryder v. Neitge (21 Minn. 70), 1356, 1357.
Ryder v. Wombwell (L. R. 4 Ex. 32), 130, 132.
Ryerson v. Chapman (66 Me. 557), 1798.
Rylands v. Kreitman (19 C. B. 351), 1158.
Ryle v. Loom Works (87 Fed. R. 976), 600.
Rynearson v. Turner (52 Mich. 7), 971.
Sabre v. Smith (62 N. H. 663), 434, 438, 449.
Safford, Ex parte (2 Low.), 563.
Safford v. Grout (120 Mass. 20), 882.
Safford v. McDonough (120 Mass. 290), 386, 542, 725, 1474, 1670.
Sage v. Sleutz (23 Ohio St. 1), 569, 588.
Sale v. Lambert (L. R. 18 Eq. 1), 435.
Salisbury v. Stainer (19 Wend. 159), 1322.
Salle v. Light (4 Ala. 700), 1798.
Salmon v. Boykin (66 Md. 541), 1138, 1139, 1161.
Salmon Falls Mfg. Co. v. Goddard (14 How. 447), 426, 434, 436, 439, 451, 455, 456.
Salt Co. v. Guthrie (35 Ohio St. 666), 208.
Salte v. Field (5 T. R. 211), 1591, 1592.
Salter v. Burt (20 Wend. 205), 1135.
Salter v. Woollams (2 Man. & Gr. 650), 1192, 1193.
Saltus v. Everett (20 Wend. 267), 154, 156, 269, 890, 923.
Salvo v. Duncan (49 Wis. 151), 1831.
Sample v. Bridgforth (72 Miss. 293), 276.
Sampson v. Townsend (25 La. Ann. 78), 1022.
Sampson v. Williamson (6 Tex. 102), 8.
Samuel v. Cheney (135 Mass. 278), 887.
Samuels v. Guin (49 Mo. App. 8), 1273.
San Antonio Brewing Ass'n v. Arctic Mfg. Co. (81 Tex. 99), 603.
Sanborn v. Benedict (78 Ill. 309), 202, 1130, 1189, 1691.
Sanborn v. Chamberlin (101 Mass. 409), 461.
Sanborn v. Chittenden (27 Vt. 171), 565.
Sanborn v. Flagler (9 Allen, 474), 434, 436, 451.
Sanborn v. Kittredge (20 Vt. 632), 964.
Sanborn v. Shepherd (59 Minn. 144), 1407.
Sandage v. Studabaker Bros. Mfg. Co. (142 Ind. 148), 833.
Sandeman v. Scurr (L. R. 2 Q. B. 86), 1549.
Sanders v. Chandler (26 Minn. 273), 974.
Sanders v. Jameson (2 C. & K. 557), 1377.
Sanders v. Johnson (29 Ga. 526), 1052.
Sanders v. Keber (28 Ohio St. 630), 269, 573, 599, 887.
Sanders v. Muegge (91 Ind. 214), 953.
Sanders v. Norton (4 T. B. Mon. 464), 1417.
Sanders v. Wilson (19 D. C. 555), 569.
Sandford v. Handy (23 Wend. 260), 937, 1281.

References are to sections: Vol. I, §§ 1-797; Vol. II. §§ 798-1850.

Sandford v. Wiggins Ferry Co. (27 Ind. 522), 755.
Sands v. Codwise (4 Johns. 596), 945, 978.
Sands v. Potter (165 Ill. 397), 64.
Sands v. Taylor (5 Johns. 395), 1320, 1329, 1629, 1630, 1643, 1680.
Sandwich Mfg. Co. v. Feary (34 Neb. 411), 823, 1384.
Sanford v. Dodd (2 Day, 437), 916.
Sanger v. Dun (47 Wis. 615), 266.
Sanger v. Hibbard (— Ind. Ter. —), 109.
Sanger v. Waterbury (116 N. Y. 371), 498, 519.
Sannoner v. King (49 Ark. 299), 950.
Santa Clara Mill & Lbr Co. v. Hayes (76 Cal. 387), 1003.
Sarbecker v. State (65 Wis. 171), 739, 740, 777, 1181.
Sargent v. Butts (21 Vt. 99), 1057.
Sargent v. French (54 Vt. 384), 138.
Sargent v. Currier (49 N. H. 310), 1797.
Sargent v. Gile (8 N. H. 325), 588.
Sargent v. Metcalf (5 Gray, 306), 549, 555, 599, 601.
Sarl v. Bourdillon (1 C. B., N. S., 188), 430.
Satterlee v. Cronkhite (114 Mich. 634), 630.
Sattler v. Hallock (160 N. Y. 291), 23.
Saunders v. Bartlett (12 Heisk. 316), 51, 752.
Saunders v. Hackney (10 Lea, 194), 451.
Saunders v. Hatterman (2 Ired. L. 32), 880.
Saunders v. Ott (1 McCord, 572), 132.
Saunders v. Topp (4 Exch. 390), 1379.
Saunderson v. Jackson (2 B. & P. 238), 428, 451, 456.
Savage v. Everman (7 Pa. St. 315), 1420.
Savage v. Murphy (34 N. Y. 508), 975.
Savage v. Stevens (126 Mass. 207), 875.
Savage Mfg. Co. v. Armstrong (19 Me. 147), 1128.
Savannah Cotton Press v. MacIntyre (92 Ga. 166), 603.
Saveland v. Green (40 Wis. 431), 247.
Savery v. Spence (13 Ala. 561), 1719.
Saville v. Tancred (1 Ves. Sr. 101), 1719.
Savings Bank v. Albee (63 N. H. 152), 878.
Sawdon v. Andrews (30 L. T., N. S., 23), 1770.
Sawyer v. Brossart (67 Iowa, 678), 228.
Sawyer v. Dean (114 N. Y. 469), 1638, 1643.
Sawyer v. Gerrish (70 Me. 254), 200.
Sawyer v. Joslin (20 Vt. 172), 1576, 1577, 1599.
Sawyer v. Lufkin (56 Me. 308), 84.
Sawyer v. Railway Co. (22 Wis. 402), 549, 1148.
Sawyer v. Smith (109 Mass. 220), 1046.
Sawyer v. Taggart (14 Bush, 727), 1032.
Sawyer v. Ware (36 Ala. 675), 324, 328.
Saxe v. Penokee Lbr. Co. (159 N. Y. 371), 1736, 1738.
Sayles v. Cox (95 Tenn. 579), 49.
Sayles v. Wellman (10 R. I. 465), 1057.
Scales v. Wiley (68 Vt. 39), 308.
Scanlan v. Cobb (85 Ill. 296), 74.
Scanlan v. Geddes (112 Mass. 15), 437.
Scarbrough v. Alcorn (74 Tex. 358), 485.
Scarlett v. Snodgrass (92 Ind. 262), 138.
Schaible v. Ardner (98 Mich. 70), 970.
Schankel v. Moffatt (53 Ill. App. 382), 1013.
Schaps v. Lehnen (54 Minn. 208), 77.
Scharpf v. Meyer (133 Mo. 428), 549, 550, 736, 779, 791, 792.
Schell v. Stephens (50 Mo. 375), 1302.
Schenck v. Saunders (13 Gray, 32), 23.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Schenectady Stove Co. v. Holbrook (101 N. Y. 45), 224.
Schindler v. Houston (1 Denio, 48), 478.
Schindler v. Westover (99 Ind. 395), 25.
Schlee v. Guckenheimer (179 Ill. 593), 1043.
Schlesinger v. Stratton (9 R. I. 578), 678, 681, 682.
Schloss v. Feltus (96 Mich. 619), 923, 924, 925, 1370, 1375.
Schmentz v. Dwyer (53 Pa. St. 335), 736.
Schmidt v. Nunan (63 Cal. 371), 750.
Schmidt v. Thomas (75 Wis. 529), 358, 361.
Schneider v. Heath (3 Camp. 506), 933.
Schneider v. Norris (2 M. & S. 286), 451.
Schneider v. Oregon Co. (20 Oreg. 172), 1412, 1662, 1674.
Schneider v. Sansom (62 Tex. 201), 144.
Schneider v. Turner (130 Ill. 28), 1034, 1043.
Schnitzer v. Oriental Print Works (114 Mass. 123), 1328.
Schoenberger v. City of Elgin (164 Ill. 80), 1351.
Schofield v. Schiffer (156 Pa. St. 65), 905, 918.
Scholefield v. Robb (2 Mood. & R. 210), 1270.
Scholfield Gear & Pully Co. v. Scholfield (71 Conn. 1), 875, 1840.
School Directors v. Trafethren (10 Bradw. 127), 253, 257.
Schoonmaker v. Keely (42 Hun, 299), 915, 917, 919.
Schopp v. Taft (106 Iowa, 612), 1391.
Schotsmans v. Railway Co. (2 Ch. App. 332), 735, 779, 787), 1526, 1545, 1548, 1550, 1620.
Schrader v. Hoover (80 Iowa, 243), 139.
Schramm v. Boston Sugar Ref. Co. (146 Mass. 211), 1254, 1690.
Schram v. Strousel (28 S. W. R. 262), 895.
Schramm v. Taylor (51 Kan. 547), 955.
Schubert v. Clark (49 Minn. 331), 878.
Schuchardt v. Allens (1 Wall. 359), 1281, 1287, 1320, 1810.
Schuff v. Ranson (79 Ind. 458), 72, 73.
Schumacher v. Allis (70 Ill. App. 556), 647.
Schumaker v. Mather (133 N. Y. 590), 1841.
Schurmeier v. English (46 Minn. 306), 1835.
Schuyler v. Russ (2 Caines, 202), 1272.
Schwartz v. McCloskey (156 Pa. St. 258), 914.
Schwenk v. Wyckoff (46 N. J. Eq. 560), 200.
Scott v. Brown (2 Q. B. 724), 995.
Scott v. Dry Goods Co. (48 Mo. App. 521), 1590.
Scott v. England (2 Dowl. & L. 520), 1674.
Scott v. Gilmore (3 Taunt. 226), 1004.
Scott v. Hix (2 Sneed, 192), 1302.
Scott v. Hough (151 Pa. St. 630), 620.
Scott v. Irving (1 B. & Ad. 605), 1455.
Scott v. King (12 Ind. 203), 714.
Scott v. Kittanning Coal Co. (89 Pa. St. 231), 1145, 1148.
Scott v. Littledale (8 E. & B. 815), 848.
Scott v. McGrath (7 Barb. 53), 1281.
Scott v. Pettit (3 Bos. & Pul. 469), 1577.
Scott v. Railway Co. (12 M. & W. 38), 283, 349.
Scott v. Raymond (31 Minn. 437), 1394.
Scott v. Renick (1 B. Mon. 63), 1314, 1355.
Scott v. Scott (2 A. K. Marsh. 217), 1302, 1795.
Scott v. Warner (2 Lans. 49), 274.
Scott v. Wells (6 Watts & S. 368), 519, 524.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Scott Lumber Co. v. Hafner-Lotham Mfg. Co. (91 Wis. 667), 1311, 1690.
Scotten v. Sutter (37 Mich. 526), 499, 516.
Scranton v. Clark (39 N. Y. 220), 1302, 1305.
Scranton v. Steward (52 Ind. 68), 108.
Screws v. Roach (22 Ala. 675), 508.
Scriven v. Moote (36 Mich. 64), 342.
Scroggin v. Wood (87 Iowa, 497), 684, 875.
Scudder v. Bradbury (106 Mass. 422), 541, 549, 564.
Scudder v. Worster (11 Cush. 573), 695, 714.
Scully v. Dodge (40 Kan. 395), 1455.
Scull v. Shakespear (75 Pa. St. 297), 755.
Seale v. Baker (70 Tex. 283), 878.
Seals v. Robinson (75 Ala. 363), 973.
Seanor v. McLaughlin (165 Pa. St. 150), 619, 620.
Searcy v. Hunter (81 Tex. 644), 132.
Searle v. Galbraith (73 Ill. 269), 67.
Seattle Board of Trade v. Hayden (4 Wash. 263), 138.
Seattle Ry. Co. v. Brewing Co. (5 Wash. 462), 1410.
Seaver v. Phelps (11 Pick. 304), 74, 77, 79.
Seavy v. Potter (121 Mass. 297), 909.
Seavy v. Dearborn (19 N. H. 351), 953.
Sebastian May Co. v. Codd (77 Md. 293), 1426.
Seckel v. Stott (66 Ill. 106), 498, 527.
Secomb v. Nutt (14 B. Mon. 261), 1540, 1556, 1602.
Second Nat. Bank v. Cummings (89 Tenn. 609), 779.
Second Nat. Bank v. Walbridge (19 Ohio St. 419), 1507.
Second Nat. Bank v. Wentzell (151 Pa. St. 142), 1429.
Secret Service Co. v. Gill-Alexander Mfg. Co. (125 Mo. 140), 1729.
Security Bank v. Luttgen (29 Minn. 363), 774, 779.
Sedgwick v. Cottingham (54 Iowa, 512), 524, 527, 529, 1081, 1128, 1189.
Seed v. Lord (66 Me. 580), 552.
Seeger v. Duthie (8 C. B., N. S., 45), 861.
Seekonk v. Rehoboth (8 Cush. 371), 1136.
Seeley v. Price (14 Mich. 541), 65.
Seeley v. Welles (120 Pa. St. 69), 888.
Seeligson v. Lewis (65 Tex. 215), 203, 1031, 1039.
Seeligson v. Philbrick (30 Fed. R. 600), 774.
Segrist v. Crabtree (131 U. S. 287), 564, 586, 632, 1423.
Seidenbender v. Charles (4 Serg. & R. 151), 1046.
Seigwarth v. Leppel (76 Pa. St. 476), 1818.
Seiple v. Irwin (30 Pa. St. 513), 1446, 1447, 1448.
Seim v. State (55 Md. 566), 55.
Seitz v. Brewers' Refrigerating Co. (141 U. S. 510), 1254, 1256, 1349.
Seixas v. Woods (2 Caines, 48), 1334.
Selby v. Selby (3 Meriv. 2), 451.
Selch v. Jones (28 Ind. 255), 336.
Sellers v. Stevenson (163 Pa. St. 262), 1311.
Selser v. Roberts (105 Pa. St. 242), 1320, 1321, 1334.
Selway v. Fogg (5 M. & W. 83), 912, 1411.
Semenza v. Brinsley (18 Com. B., N. S., 467), 1451.
Sentance v. Poole (3 Car. & P. 1), 73.
Sequin v. Peterson (45 Vt. 255), 189.
Settle v. Garner (Oliphant, 86), 1270.
Setz v. Refrigerating Co. (141 U. S. 510), 1314.
Sewall v. Fitch (8 Cow. 215), 305, 307.
Sewall v. Henry (9 Ala. 24), 689.
Seward v. Jackson (8 Cow. 406), 972.
Sewell v. Eaton (6 Wis. 490), 527.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Sexton v. Graham (53 Iowa, 181), 25, 26, 642.
Sexton v. Wheaton (8 Wheat. 229), 973, 975.
Seymour v. Brown (19 John. 44), 22.
Seymour v. Davis (2 Sandf. 239), 305.
Seymour v. Farquhar (93 Ala. 292), 564, 585, 599.
Seymour v. Montgomery (1 Keyes, 463), 755.
Seymour v. Newton (105 Mass. 272), 1530, 1571.
Seymour v. O'Keefe (44 Conn. 128), 962, 963.
Shadbolt, etc. Iron Co. v. Topliff (85 Wis. 513), 264.
Shaddon v. Knott (2 Swan, 358), 960.
Shambaugh v. Current (— Iowa, —), 1336.
Shand v. Bowes (1 Q. B. Div. 470), 653.
Shand v. Bowes (2 App. Cas. 480), 1333.
Shand v. Hanley (71 N. Y. 319), 973.
Shardlow v. Cotterell (18 Ch. D. 280), 426.
Sharman v. Brandt (L. R. 6 Q. B. 720), 452, 462, 467.
Sharp v. Carroll (66 Wis. 62), 413.
Sharpe v. Bettis (— Ky. —), 1817, 1826.
Sharpe v. San Pauls R. Co. (L. R. 8 Ch. App. 597), 673.
Sharpless v. Gummey (166 Pa. St. 199), 896.
Sharpless Bros. v. Derr (62 Mo. App. 359), 967.
Shattuck v. Green (104 Mass. 42), 1302.
Shauer v. Alterton (151 U. S. 607), 953.
Shaul v. Harrington (54 Ark. 305), 964, 965, 984, 990.
Shaw v. Badger (12 Serg. & R. 275), 1162.
Shaw v. Carbrey (13 Allen, 462), 334.
Shaw v. Carpenter (54 Vt. 155), 1004.
Shaw v. Clark (6 Vt. 507), 1419.
Shaw v. Hoffman (21 Mich. 157), 1709.
Shaw v. Lady Ensley Coal Co. (147 Ill. 526), 1625.
Shaw v. Mudd (8 Pick. 9), 41.
Shaw v. Presbyterian Church (39 Pa. St. 226), 1428.
Shaw v. Railroad Co. (101 U. S. 557), 166.
Shaw v. Smith (48 Conn. 306), 755.
Shaw v. Smith (45 Kan. 334), 210, 1334, 1345, 1354, 1823.
Shaw v. Spooner (9 N. H. 197), 1004.
Shaw v. Wilshire (65 Me. 485), 39, 960.
Shaw Lumber Co. v. Manville (— Idaho, —), 361.
Shawhan v. Van Nest (25 Ohio St. 490), 754, 1676, 1696.
Shealey v. Edwards (73 Ala. 175), 206, 207, 1659.
Shean v. Shay (42 Ind. 375), 970.
Shearer v. Park Nursery Co. (103 Cal. 415), 1817, 1819.
Sheffield v. Mitchell (31 App. Div. 266), 925.
Sheffield Canal Co. v. Railway Co. (3 Rail. & Can. Cas. 121), 233.
Sheffield Furnace Co. v. Hull Coal Co. (101 Ala. 446), 264, 741.
Sheldon v. Capron (3 R. I. 171), 272.
Sheldon v. Mann (85 Mich. 265), 955.
Sheldon Co. v. Mayers (81 Wis. 627), 603.
Sheley v. Whitman (67 Mich. 397), 433.
Shelley v. Boothe (73 Mo. 74), 952, 955.
Shelton v. Church (38 Conn. 416), 954.
Shelton v. Ellis (70 Ga. 297), 278.
Shelton v. Franklin (68 Ill. 333), 499, 516, 518.
Shelton v. Gillett (79 Mich. 173), 1136.
Shepard v. Pressey (32 N. H. 50), 373, 518.
Shepard & Morse Lumber Co. v. Burroughs (62 N. J. L. 469), 1564, 1565.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Shepherd v. Busch (154 Pa. St. 149), 1435, 1925, 1926.
Shepherd v. Gilroy (46 Iowa, 193), 1254, 1259.
Shepherd v. Harrison (L. R. 4 Q. B. 196), 780, 782, 785, 787.
Shepherd v. Jenkins (73 Mo. 510), 834.
Shepherd v. Kain (5 B. & Ald. 240), 1236, 1333, 1339.
Shepherd v. Pybus (3 Man. & Gr. 868), 1317.
Shepherd v. Trigg (7 Mo. 151), 960.
Sheppard v. Newhall (54 Fed. R. 306), 1566.
Sheppard v. Newhall (7 U. S. App. 544), 1586, 1587, 1612.
Sherburne v. Shaw (1 N. H. 157), 434.
Sherman v. Barnard (19 Barb. 291), 199.
Sherman v. Rugee (55 Wis. 346), 1571, 1578.
Sherman v. Transportation Co. (31 Vt. 162), 1305.
Sherman Center Town Co. v. Leonard (46 Kan. 354), 1777, 1779.
Sherwin v. National Cash Register Co. (5 Colo. App. 162), 258.
Sherwood v. Walker (66 Mich. 568), 274, 275, 276, 424.
Sheuer v. Goetter (102 Ala. 313), 923.
Shickle v. Chouteau (10 Mo. App. 241), 1168.
Shields v. Pettee (2 Sandf. 262), 652.
Shields v. Pettee (4 N. Y. 122), 41.
Shindler v. Houston (1 N. Y. 261), 358, 370, 376, 378, 382, 383.
Shinn v. Bodine (60 Pa. St. 182), 1145.
Shipman v. Seymour (40 Mich. 274), 923, 924.
Shippen v. Bowen (122 U. S. 575), 1235, 1810.
Shippey v. Eastwood (9 Ala. 198), 1045.
Shipps v. Atkinson (8 Ind. App. 505), 1633.
Shipway v. Broadwood (1 Q. B. 369), 1397.
Shipton v. Casson (5 B. & C. 386), 1162.
Shirk v. Shultz (113 Ind. 571), 118, 120.
Shirley v. Shirley (7 Blackf. 452), 449.
Shisler v. Baxter (109 Pa. St. 443), 1314, 1355.
Shone v. Lucas (3 Dowling & Ry. 218), 1540.
Shordan v. Kyler (87 Ind. 38), 1235.
Short v. Ston[illegible] (8 Q. B. 358), 1097.
Shrimpton v. Warmack (72 Miss. 208), 1159.
Shrock v. Crowl (83 Ind. 243), 97.
Shropshire v. Barns (46 Ala. 188), 97.
Shuenfeldt v. Junkermann (20 Fed. R. 357), 739.
Shufeldt v. Pease (16 Wis. 659), 924.
Shumway v. Rutter (7 Pick. 56), 981, 987.
Shumway v. Rutter (8 Pick. 443), 483, 963.
Shupe v. Collender (56 Conn. 489), 1395, 1807.
Shurman v. Gassett (4 Gilm. 521), 1043.
Shurtleff v. Willard (19 Pick. 202), 964.
Shurts v. Howell (30 N. J. Eq. 418), 971.
Sibley v. Hulbert (15 Gray, 509), 932.
Sibley v. Tie (88 Ill. 287), 1189.
Sidensparker v. Sidensparker (52 Me. 481), 955.
Siegel v. Brooke (25 Ill. App. 207), 1304.
Siegel, Cooper & Co. v. Eaton Co. (165 Ill. 550), 1100.
Sievewright v. Archibald (17 Q. B. 103), 234, 468.
Siffken v. Wray (6 East, 371), 1535, 1591.
Sigerson v. Harker (15 Mo. 101), 491.
Sigerson v. Kahman (39 Mo. 206), 1485.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Silberman v. Clark (96 N. Y. 522), 741.
Silberman v. Monroe (104 Mich. 352), 924.
Sillers v. Lester (48 Miss. 513), 202.
Silsbury v. McCoon (3 N. Y. 379), 639.
Silsby v. Boston & Albany R. Co. (176 Mass. 158), 547, 552, 557.
Silsby Mfg. Co. v. Town of Chico (24 Fed. R. 893), 668.
Silver Bow Mining Co. v. Lowry (6 Mont. 288), 564, 578.
Silvernail v. Cole (12 Barb. 685), 199.
Simmonds v. Humble (13 C. B. 258), 373.
Simmons v. Green (35 Ohio St. 104), 1121, 1129.
Simmons v. Law (3 Keyes, 219), 1264.
Simmons v. Swift (5 B. & C. 862), 281, 515, 1119, 1129, 1485, 1670.
Simmons Hardware Co. v. Mullen (33 Minn. 195), 356, 365.
Simms v. McKee (25 Iowa, 341), 649.
Simms v. Norris (5 Ala. 42), 126.
Simon v. Johnson (105 Ala. 344), 1447, 1448.
Simon v. Motivos (3 Burr. 1921), 461.
Simons v. Busby (119 Ind. 13), 970.
Simpson v. Alexander (35 Kan. 225), 1786.
Simpson v. Commonwealth (89 Ky. 412), 451, 455.
Simpson v. Crippin (L. R. 8 Q. B. 14), 1141, 1145, 1148.
Simpson v. Eggington (10 Exch. 845), 1466.
Simpson v. McKay (12 Ired. 141), 1270.
Simpson v. Nicholls (3 M. & W. 240), 1057, 1058.
Simpson v. Pegram (108 N. C. 407), 50.
Simpson v. Petapsco Guano Co. (99 Ga. 168), 188.
Simpson v. Potts (Oliphant's Law of Horses, 224), 1270.
Simpson v. Shackleford (49 Ark. 63), 585, 599.
Sims v. Eiland (57 Miss. 83), 875.
Sims v. Everhardt (102 U. S. 300), 108.
Sims v. James (62 Ga. 260), 599.
Sims v. Marryatt (17 Q. B. 281), 1301.
Sinclair v. Hathaway (57 Mich. 60), 1344, 1356, 1357.
Sinclair v. Healy (40 Pa. St. 417), 923.
Sinclair v. Wheeler (69 N. H. 538), 603.
Singer v. Schilling (74 Wis. 369), 924.
Singer Mfg. Co. v. Bullard (62 N. H. 129), 585.
Singer Mfg. Co. v. Cole (4 Lea, 439), 49, 569.
Singer Mfg. Co. v. Graham (8 Oreg. 17), 569, 599.
Singer Mfg. Co. v. Gray (121 N. C. 163), 569.
Singer Mfg. Co. v. Nash (70 Vt. 434), 603, 604.
Singer Mfg. Co. v. Smith (40 S. C. 529), 571, 578.
Singer Mfg. Co. v. Treadway (4 Ill. App. 57), 629.
Singer Sew. M. Co. v. Holcomb (40 Iowa, 33), 599.
Singerly v. Thayer (108 Pa. St. 291), 664, 665, 667.
Sisson v. Hibbard (75 N. Y. 542), 645.
Sisson v. Hill (18 R. I. 212), 919.
Skeels v. Phillips (54 Ill. 309), 996.
Skiff v. Johnson (57 N. H. 475), 1019, 1027.
Skinner v. Gunn (9 Port. 305), 1281, 1294.
Skinner v. Maxwell (66 N. C. 45), 120.
Skinner v. Michigan Hoop Co. (119 Mich. 467), 902, 915.
Skinner v. Tirrell (159 Mass. 474), 185.
Skipper v. Stokes (42 Ala. 570), 200, 202.
Slack v. Collins (145 Ind. 569), 1482.
Slater v. Smith (117 Mass. 96), 437.
Slaughter v. Green (1 Rand. 3), 21, 22.
Slaughter's Adm'r v. Gerson (13 Wall. 379), 879, 880.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Slaymaker v. Irwin (4 Whart. 369), 220.
Slayton v. Barry (175 Mass. 513), 119.
Slayton v. McDonald (73 Me. 50), 16.
Sledge v. Obenchain (58 Miss. 670), 976.
Sleeper v. Chapman (121 Mass. 404), 150, 151.
Sleeper v. Davis (64 N. H. 59), 148, 909, 924.
Sleeper v. Pollard (28 Vt. 709), 964.
Sleeper v. Wood (60 Fed. R. 888), 1242.
Sloan v. Baird (162 N. Y. 327), 1736
Sloan v. Hudson (119 Ala. 27), 159.
Sloane v. Shiffer (156 Pa. St. 59), 915, 918.
Slocum v. Seymour (36 N. J. L. 138), 336.
Sloggy v. Crescent Creamery Co. (72 Minn. 316), 1832.
Slowey v. McMurray (27 Mo. 113), 689.
Slubey v. Heyward (2 H. Bl. 504), 1499.
Smack v. Cathedral (31 N. Y. App. Div. 559), 1408.
Small v. Quincy (4 Me. 497), 446, 1170.
Small v. Stevens (65 N. H. 209), 1380.
Smalley v. Hamblin (170 Mass. 380), 307.
Smalley v. Hendrickson (29 N. J. L. 371), 502, 661, 1402.
Smart v. Batchelder (57 N. H. 140), 521.
Smedley v. Felt (41 Iowa, 588), 139.
Smeed v. Foord (1 El. & El. 602), 1773, 1792.
Smethurst v. Woolston (5 W. & S. 106), 685.
Smidt v. Tiden (L. R. 9 Q. B. 446), 199.
Smiley v. Barker (83 Fed. R. 684), 1134, 1850.
Smiley v. Barker (55 U. S. App. 125), 1089.
Smilie v. Hobbs (64 N. H. 75), 1288.
Smith's Appeal (69 Pa. St. 474), 449.
Smith v. Acker (23 Wend. 653), 960.
Smith v. Andrews (8 Ired. 3), 933.
Smith v. Arnold (5 Mason, 414), 438, 461, 462.
Smith v. Arnold (106 Mass. 269), 1050.
Smith v. Barber (153 Ind. 322), 619, 1377.
Smith v. Barker (102 Ala. 679), 1539, 1541.
Smith v. Bean (15 N. H. 577), 1053, 1054.
Smith v. Beattie (31 N. Y. 542), 40.
Smith v. Beatty (2 Ired. Eq. 456), 64.
Smith v. Benson (1 Hill, 176), 336.
Smith v. Berry (18 Me. 122), 1747.
Smith v. Bettger (68 Ind. 254), 1425.
Smith v. Bickmore (4 Taunt. 474), 999.
Smith v. Bolles (132 U. S. 125), 1843.
Smith v. Bouvier (70 Pa. St. 325), 1032.
Smith v. Boyer (29 Neb. 76), 954, 955.
Smith v. Brennan (62 Mich. 349), 356, 366.
Smith v. Brittenham (98 Ill. 188), 918.
Smith v. Brown (3 Hawks, 580), 1420,
Smith v. Bryan (5 Md. 141), 337.
Smith v. Chadwick (20 Ch. Div. 27), 876.
Smith v. Case (2 Oreg. 190), 1057.
Smith v. Champney (50 Iowa, 174), 964.
Smith v. Chance (2 B. & Ald. 753), 1187, 1192, 1412.
Smith v. Coolidge (68 Vt. 516), 1441, 1442.
Smith v. Colby (136 Mass. 562), 428.
Smith v. Collins (94 Ala. 394), 953.
Smith v. Corege (53 Ark. 295), 1332.
Smith v. Countryman (30 N. Y. 655), 899.
Smith v. Clark (21 Wend. 83), 22.
Smith v. Clews (105 N. Y. 283), 160.
Smith v. Clews (114 N. Y. 190), 154.
Smith v. Cuff (6 M. & Sel. 160), 1000.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Smith v. Dennie (6 Pick. 262), 549, 551, 552, 1482.
Smith v. De Vaughn (82 Ga. 574), 583.
Smith v. Droubay (20 Utah, 443). 175.
Smith v. Dunlop (12 Ill. 184), 1741.
Smith v. Edwards (156 Mass. 221), 731, 756.
Smith v. Estey Organ Co. (100 Ga. 628), 942.
Smith v. Evans (5 Humph. 70), 109.
Smith v. Evans (36 S. C. 69), 386.
Smith v. Field (5 T. R. 402), 1591.
Smith v. First Nat. Bank (45 Neb. 444), 908.
Smith v. Friend (15 Cal. 124), 711.
Smith v. Gillett (50 Ill. 290), 734, 1124, 1412.
Smith v. Gilmore (7 D. C. App. 119), 619.
Smith v. Gowdy (8 Allen, 566), 221.
Smith v. Goss (1 Camp. 282), 1571, 1577.
Smith v. Greer (3 Humph. 118), 974.
Smith v. Griffeth (3 Hill, 337), 208.
Smith v. Gufford (36 Fla. 481), 592, 643.
Smith v. Hale (158 Mass. 178), 626, 677, 816, 819, 1191, 1275, 1805.
Smith v. Hall (19 Ill. App. 17), 1459.
Smith v. Hightower (76 Ga. 629), 1344.
Smith v. Hudson (6 B. & S. 431), 355, 369, 374, 393, 1496.
Smith v. Hudson (34 L. J. Q. B. 145), 1181.
Smith v. Hughes (L. R. 6 Q. B. 597), 846, 847, 848, 849, 869.
Smith v. James (53 Ark. 135), 175, 1455.
Smith v. Johnson (71 Mo. 382), 1462.
Smith v. Jordan (13 Minn. 264), 1097.
Smith v. Justice (13 Wis. 600), 1235, 1237.
Smith v. Kidd (68 N. Y. 130), 1453, 1459.
Smith v. Lamberts (7 Gratt. 138), 1455.
Smith v. Leighton (38 Kan. 544), 321.
Smith v. Lewis (40 Ind. 98), 913, 1161.
Smith v. Lime Co. (57 Ohio St. 518), 1738.
Smith v. Love (64 N. C. 439), 1311.
Smith v. Lozo (42 Mich. 6), 588, 605.
Smith v. Lynes (5 N. Y. 41), 549, 552, 890, 891.
Smith v. Mariner (5 Wis. 551), 877.
Smith v. Mawhood (14 M. & W. 452), 1051.
Smith v. Mayer (3 Colo. 207), 1395.
Smith v. Mayo (9 Mass. 62), 121.
Smith v. Morse (20 La. Ann. 220), 264.
Smith v. McCall (1 McCord, 220), 1319.
Smith v. McLean (24 Iowa, 322), 649.
Smith v. McNair (19 Kan. 330), 1332.
Smith v. Neale (2 C. B. 67), 834, 1301.
Smith v. Nevitt (Walk. 370), 1413.
Smith v. Newland (9 Hun, 553), 628.
Smith v. N. Y. Cent. R. Co. (4 Keyes, 180), 305.
Smith v. O'Bryan (11 L. T. 346), 1270.
Smith v. Perry (29 N. J. L. 74), 175.
Smith v. Pettee (70 N. Y. 13), 654, 1077, 1629, 1642, 1643.
Smith v. Pierce (110 Mass. 35), 626.
Smith v. Rail Mill Co. (50 Ark. 31), 1391.
Smith v. Reid (134 N. Y. 568), 972.
Smith v. Richards (13 Pet. 26), 881.
Smith v. Selz (114 Ind. 229), 952.
Smith v. Shell (82 Mo. 215), 440.
Smith v. Sloan (37 Wis. 285), 143.
Smith v. Smith (2 Hill, 351), 1417.
Smith v. Smith (25 Wend. 405), 1417.
Smith v. Smith (30 Vt. 139), 914.
Smith v. Smith (2 Johns. 235), 1440.
Smith v. Smith (21 Pa. St. 367), 904.
Smith v. Smith (91 Mich. 7), 28.
Smith v. Sparkman (55 Miss. 649), 508.
Smith v. Stern (17 Pa. St. 360), 963.
Smith v. Stoller (26 Wis. 671), 367, 369, 373.
Smith v. Surman (5 Barn. & Ald. 613), 300.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Smith v. Surman (9 B. & C. 561), 305, 313, 337, 427.
Smith v. Swarthout (15 Wis. 550), 1265.
Smith v. Tilton (10 Me. 350), 565.
Smith v. Tracy (36 N. Y. 79), 1281.
Smith v. Wellborn (75 Ga. 799), 953.
Smith v. Wheeler (7 Oreg. 49), 1187, 1696.
Smith v. Williams (1 Murph. 426), 1255.
Smith, K. & F. Co. v. Smith (166 Pa. St. 563), 892, 899.
Smither v. Calvert (44 Ind. 242), 872.
Smock v. Dade (5 Rand. 639), 1455.
Smock v. Smock (37 Mo. App. 56), 344.
Smoot's Case (15 Wall. 36), 1090.
Smout v. Ilbery (10 Mees. & W. 1), 1223.
Sneathen v. Grubbs (88 Pa. St. 147), 733. 1184.
Snee v. Prescott (1 Atk. 245), 1526.
Snelgrove v. Bruce (16 Up. Can. C. P. 561), 1316.
Snelling v. Arbunkle (104 Ga. 362), 46, 49.
Snider v. Thrall (56 Wis. 674), 379.
Snodgrass v. Broadwell (2 Litt. 353), 207.
Snoddy v. American Nat. Bank (88 Tenn. 573), 1031, 1039.
Snody v. Shier (88 Mich. 304), 682, 1385, 1386.
Snow v. Shomacker Mfg. Co. (69 Ala. 111), 1240, 1241, 1265, 1344.
Snow v. Warner (10 Metc. 132), 363, 365.
Snowden v. Warder (3 Rawle, 101), 1230.
Snowden v. Waterman (105 Ga. 384), 1346, 1825.
Snyder v. Hegand (— Ky. —), 942.
Snyder v. Partridge (138 Ill. 173), 957.
Snyder v. Tibbals (32 Iowa, 447), 714.
Snyder v. Vaux (2 Rawle, 427), 639.
Soames v. Spencer (1 Dowl. & R. 32), 453.
Soles v. Hickman (20 Pa. St. 180), 438, 439.
Solomon v. Bushnell (11 Oreg. 277), 1507.
Solomon v. Dreschler (4 Minn. 278), 1051.
Solomon v. Hathaway (126 Mass. 482), 546, 549, 628.
Solomon v. King (63 N. J. L. 39), 365.
Solomon v. Webster (4 Col. 353), 229.
Solomons v. Chesley (58 N. H. 238), 1516.
Soltau v. Gerdau (119 N. Y. 380), 149, 154, 169.
Somerby v. Buntin (19 Am. R. 459), 330, 331, 1729.
Somers v. Richards (46 Vt. 170), 937.
Somes v. Shipping Co. (El., Bl. & El. 353), 1475.
Sondheim v. Gilbert (117 Ind. 71), 203, 1031, 1039.
Sonneboom v. Moore (105 Ga. 497), 1456.
Soper v. Creighton (93 Me. 564), 1134.
Soper v. Fry (37 Mich. 236), 95, 97.
Souhegan Nat. Bank v. Wallace (61 N. H. 24), 999.
Sousely v. Burns (10 Bush, 87), 734, 1124, 1130.
South Australian Ins. Co. v. Randell (L. R. 3 P. C. 101), 20.
South Bend Pulley Co. v. Caldwell (— Ky. —), 1275, 1381, 1814.
South Baltimore Co. v. Muhlbach (69 Md. 395), 333.
Southbridge Savings Bank v. Exeter Mach. Works (127 Mass. 542), 646.
Southern v. Howe (2 Roll. 5), 1272.
Southern Cotton Oil Co. v. Heflin (99 Fed. R. 339), 1701.
Southern Development Co. v. Silva (125 U. S. 247), 879.
Southern Life Ins. Co. v. Cole (4 Fla. 359), 331.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Southern Music House v. Dusenbury (27 S. C. 464), 571, 603.
Southern Music House v. Hornsby (45 S. C. 111), 571.
Southwestern Freight Co. v. Standard (44 Mo. 71), 499, 516, 542, 1121, 1407, 1474, 1485, 1516.
Southwick v. Smith (29 Me. 228), 678.
Southworth v. Bennett (58 N. Y. 659), 1502.
Southworth v. Smith (7 Cush. 391), 1417.
Sowers v. Parker (59 Kan. 12), 937.
Spalding v. Archibald (52 Mich. 365), 336.
Spalding v. Ruding (6 Beavan, 376), 1568.
Sparks v. Marshall (2 Bing. N. C. 761), 732.
Sparks v. Messick (65 N. C. 440), 1307.
Sparling v. Marks (86 Ill. 125), 816, 820, 1805.
Spaulding v. Adams (63 Iowa, 437), 953.
Spaulding v. Austin (2 Vt. 555), 1193.
Spaulding v. Hanscom (67 N. H. 401), 932.
Spear v. Bach (82 Wis. 192), 331, 386, 391, 392.
Spear v. Crawfish (14 Wend. 23), 142.
Speier v. Opfer (73 Mich. 35), 138.
Speirs v. Halstead (74 N. C. 620), 1790.
Spence v. Insurance Co. (L. R. 3 C. P. 427), 642.
Spencer v. Cone (1 Met. 283), 307, 324.
Spencer v. Hale (30 Vt. 314), 365, 733.
Spencer v. St. Clair (57 N. H. 9), 915.
Speyer v. Baker (59 Ohio St. 11), 603, 629.
Spickler v. Marsh (36 Md. 222), 682.
Spira v. Hornthall (77 Ala. 137), 924.
Spirett v. Willows (3 De G., J. & S. 292), 974.
Spooner v. Cummings (151 Mass. 313), 602.
Sprague v. Blake (20 Wend. 61), 401.
Sprague v. Kemp (74 Minn. 465), 901.
Sprague v. Rooney (82 Mo. 493), 1022.
Sprague v. Warren (26 Neb. 326), 1031, 1032.
Spring Co. v. Knowlton (103 U. S. 49), 999.
Springer v. Drosch (32 Ind. 486), 947.
Springer v. Hubbard (82 Me. 299), 1436.
Springer v. Kreeger (3 Colo. App. 487), 964.
Springfield v. Green (7 Baxt. 301), 1435.
Springfield, etc. Ass'n v. Roll (137 Ill. 205), 947.
Springfield Engine Co. v. Kennedy (7 Ind. App. 502), 1384.
Springfield Milling Co. v. Barnard (49 U. S. App. 438), 1844.
Springwell v. Allen (2 East, 448), 1311, 1795.
Sprott v. United States (87 U. S. 459), 1024.
Spurgeon v. McElwain (6 Ohio, 442), 1023.
Spurr v. Benedict (99 Mass. 463), 275.
St. Anthony Lumber Co. v. Bardwell-Robinson Co. (60 Minn. 199), 1817, 1844.
Stack v. Cavanaugh (67 N. H. 149), 109, 119.
Stacy v. Foss (19 Me. 335), 999.
Stacy v. Kemp (97 Mass. 166), 1255.
Stadfield v. Huntsman (92 Pa. St. 53), 580, 600.
Stafford v. Roof (9 Cow. 626), 98, 106, 107, 112.
Stafford v. Walter (67 Ill. 83), 736, 748, 1181.
Standard Furn. Co. v. Van Alstine (22 Wash. 670), 1004, 1013, 1022.
Standard Oil Co. v. Meyer Bros. Drug Co. (74 Mo. App. 446), 923.
Standard Underground Cable Co. v. Denver Consol. Electric Co. (76 Fed. R. 422), 1247.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Staner v. Rogers (3 Wash. 603), 1384.
Stanford v. McGill (6 N. Dak. 536), 1089, 1090.
Stange v. Wilson (17 Mich. 342), 1129, 1133, 1255.
Stanley v. Gaylord (1 Cush. 536), 154.
Stannard v. Burns (63 Vt. 244), 84.
Stanton v. Allen (5 Denio, 434), 208.
Stanton v. Eager (16 Pick. 467), 736, 740, 775, 1566, 1606, 1612.
Stanton v. French (83 Cal. 194), 1454.
Staples v. O'Neal (64 Minn. 27), 264.
Stapleton, Ex parte (10 Ch. Div. 586), 1094.
Staples v. Wellington (53 Me. 453), 67.
Star Glass Co. v. Longley (64 Ga. 576), 738.
Starace v. Rossi (69 Vt. 303), 1028.
Stark v. Thompson (3 T. B. Mon. 296), 1466.
Starkweather v. Benjamin (32 Mich. 305), 863, 875.
Starr v. Torrey (22 N. J. L. 190), 1402.
Starr v. Stevenson (91 Iowa, 684), 892, 901, 923.
Startup v. Macdonald (6 Man. & Gr. 593), 1137, 1188.
State v. Bank (45 Mo. 528), 191.
State v. Basserman (54 Conn. 88), 1029.
State v. Boston Club (45 La. Ann. 585), 55.
State v. Brady (100 Iowa, 191), 905.
State v. Carl (43 Ark. 353), 739, 740, 793, 1029.
State v. Colby (92 Iowa, 463), 1028.
State v. Durant (53 Mo. App. 493), 1199.
State v. Easton Club (73 Md. 97), 55.
State v. Fox (79 Md. 514), 935.
State v. Fuller (5 Ired. L. 26), 483.
State v. Gregory (47 Conn. 276), 1052.
State v. Hays (52 Mo. 578), 191.
State v. Hoshaw (98 Mo. 358), 446.
State v. Horacek (41 Kan. 87), 55.
State v. Howard (88 N. C. 650), 108, 114, 132.
State v. Hughes (22 W. Va. 743), 740.
State v. Intoxicating Liquors (61 Me. 520), 809, 964.
State v. Intoxicating Liquors (73 Me. 278), 740, 793.
State v. Lockyear (95 N. C. 633), 55.
State v. Mason (112 Mo. 374), 953, 954.
State v. Mercer (32 Iowa, 405), 55.
State v. Neis (108 N. C. 787), 55.
State v. O'Neil (58 Vt. 140), 739, 740, 777, 794, 1029.
State v. Peters (91 Me. 31), 736, 739, 740, 777, 793, 1181.
State v. Plaisted (43 N. H. 413), 96, 106, 108, 114.
State v. Pottmeyer (33 Ind. 402), 346.
State v. Railroad Co. (34 La. Ann. 947), 1303.
State v. Rieger (59 Minn. 151), 28.
State v. St. Louis Club (125 Mo. 308), 55.
State v. Wingfield (115 Mo. 428), 736, 739, 740, 777, 794.
State Bank v. McCoy (69 Pa. St. 204), 88.
Staunton v. Wood (16 Q. B. 638), 1134.
Staver Mfg. Co. v. Coe (49 Ill. App. 426), 901.
Stead v. Dawber (10 A. & E. 57), 447.
Stearns v. Gage (79 N. Y. 102), 953.
Stearns v. Hall (9 Cush. 31), 474.
Stearns v. Washburn (7 Gray, 187), 1199.
Steaubli v. Bank (11 Wash. 426), 702.
Stebbins v. Leowolf (3 Cush. 137), 1135.
Stebbins v. Peck (8 Gray, 553), 1057.
Steel v. Fife (48 Iowa, 99), 432.
Steel Works v. Dewey (37 Ohio St. 242), 708, 1187.
Steele v. Aspy (128 Ind. 367), 564.
Steele v. Curle (4 Dana. 381), 1013.
Steele-Smith Grocery Co. v. Potthast (—— Iowa, ——), 188.
Steelwagon v. Jeffries (44 Pa. St. 407), 964, 966.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Steen v. Harris (81 Ga. 681), 603.
Stees v. Leonard (20 Minn. 494), 1105.
Steigleman v. Jeffries (1 Serg. & R. 477), 1844.
Steinbach v. Hill (25 Mich. 78), 863, 875.
Steiner v. Ray (84 Ala. 93), 1050.
Steinhart v. Mills (94 Cal. 362), 1423.
Steinhart v. National Bank (94 Cal. 362), 1433.
Steinmeyer v. Siebert (190 Pa. St. 471), 1718, 1727.
Stenwood v. Trefethen (84 Me. 295), 1450.
Stephens v. Adair (82 Tex. 214), 947.
Stephens v. Gifford (137 Pa. St. 219), 960, 964, 981, 982, 1118, 1186.
Stephens v. Tucker (55 Ga. 543), 202.
Stephenson v. Cady (117 Mass. 6), 1148.
Stephenson v. Hart (4 Bing. 476), 887.
Stephenson v. Little (10 Mich. 433), 642.
Sterling v. Baldwin (42 Vt. 306), 336, 964.
Sterling v. Warden (51 N. H. 217), 334.
Sterry v. Arden (1 Johns. Ch. 261), 955.
Stetson v. Briggs (114 Cal. 511), 1455.
Stevens v. Adams (45 Me. 611), 1125.
Stevens v. Austin (1 Metc. 557), 915, 917.
Stevens v. Boston & Wor. R. Co. (8 Gray, 262), 740, 775.
Stevens v. Brennan (79 N. Y. 254), 924.
Stevens v. Cunningham (3 Allen, 491), 169, 685.
Stevens v. Eno (10 Barb. 95), 714.
Stevens v. Fuller (8 N. H. 463), 935.
Stevens v. Hertzler (109 Ala. 423), 682, 1382.
Stevens v. Irwin (15 Cal. 503), 964, 965, 966.
Stevens v. Ludlum (46 Minn. 160), 878, 895.
Stevens v. Works (81 Ind. 445), 973.
Stevenson v. Burgin (49 Pa. St. 36), 1158.
Stevenson v. Marble (84 Fed. R. 23), 931.
Stevenson v. McLean (5 Q. B. Div. 346), 230, 252, 257, 258.
Stevenson v. Smith (28 Cal. 103), 1780.
Stevenson v. State (65 Ind. 409), 16.
Stewart v. Conner (9 Ala. 813), 17.
Stewart v. Dougherty (3 Dana, 479), 908.
Stewart v. Emerson (52 N. H. 301), 901, 1411.
Stewart v. Munford (91 Ill. 58), 170.
Stewart v. Nelson (79 Mo. 522), 963, 964.
Stewart Paper Co. v. Rau (92 Ga. 511), 1433.
Stewart v. Stearns (63 N. H. 99), 1841.
Stewart v. Stone (127 N. Y. 500), 1100.
Stewart v. Thayer (168 Mass. 519), 1004, 1053.
Stewart v. Woodward (50 Vt. 78), 1455.
Stewart v. Wyoming Ranch Co. (128 U. S. 383), 868, 935.
Stickney v. Jordan (47 Minn. 262), 1843.
Stiles v. McClellan (6 Colo. 89), 263.
Stiles v. West (1 Sid. 109), 84.
Stiles v. White (11 Metc. 356), 1843.
Stillman v. Fleniken (58 Iowa, 450), 646.
Stillman v. Harvey (47 Conn. 27), 145.
Stilwell v. Mutual Life Ins. Co. (72 N. Y. 385), 175.
Stimson v. Helps (9 Colo. 33), 1223.
Stimson v. Wrigley (86 N. Y. 332), 951.
Stinson v. Clark (6 Allen, 340), 965.
Stix v. Keith (85 Ala. 465), 953.
St. John v. Palmer (5 Hill, 591), 1796.
St. Joze Indians, The (1 Wheat. 208), 788.
St. Louis Fair Ass'n v. Carmody (151 Mo. 566), 1023.
St. Louis Refrig. Co. v. Vinton, etc. Co. (79 Iowa, 239), 1255.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

St. Louis, etc. Ry. Co. v. Biggs (50 Ark. 169), 592.
St. Louis Ry. Co. v. Higgins (44 Ark. 293), 108, 109.
St. Paul Mill Co. v. Great Western Despatch Co. (27 Fed. R. 434), 779.
Stock v. Boston (149 Mass. 416), 1773.
Stock v. Ingles (12 Q. B. Div. 564), 796.
Stockdale v. Dunlop (6 M. & W. 224), 652.
Stockdale v. Onwhyn (7 D. & R. 625), 1007.
Stocken v. Collin (7 Mees. & W. 515), 247.
Stockham v. Stockham (32 Md. 196), 251.
Stockwell v. Baird (15 Del. 420), 360, 385.
Stoddard v. Ham (129 Mass. 383), 268, 269, 887.
Stokes v. Baars (18 Fla. 656), 1148.
Stokes v. Jones (18 Ala. 734), 150.
Stokes v. McKay (147 N. Y. 223), 1089, 1090, 1193, 1708.
Stone v. Browning (51 N. Y. 211), 358, 359, 367.
Stone v. Browning (60 N. Y. 598), 358.
Stone v. Browning (68 N. Y. 598), 426, 438.
Stone v. Dennison (13 Pick. 1), 122, 123, 124.
Stone v. Denny (4 Metc. 151), 875, 1237.
Stone v. Harmon (31 Minn. 512), 245.
Stone v. Myers (9 Minn. 303), 970, 974.
Stone v. Peacock (35 Mo. 385), 964.
Stone v. Perry (60 Me. 48), 543, 552, 628.
Stone v. Robie (66 Vt. 245), 874.
Stone v. Spencer (77 Mo. 356), 952.
Stone v. Swift (4 Pick. 389), 1194.
Stone v. Waite (88 Ala. 599), 601, 634, 1100.
Stong v. Lane (66 Minn. 94), 272.
Stoolfire v. Royse (71 Ill. 223), 1121.
Stoops v. Smith (100 Mass. 63), 1327.
Storm v. Smith (43 Miss. 497), 1302, 1307.
Storrs v. Emerson (72 Iowa, 390), 1272, 1273.
Story v. Salomon (71 N. Y. 420), 1034.
Storz v. Finkelstein (46 Neb. 577), 996.
Stose v. Heissler (120 Ill. 433), 212.
Stott v. Franey (20 Oreg. 410), 200.
Stoveld v. Hughes (14 East, 308), 381, 1503.
Stowe v. Taft (58 N. H. 445), 960.
Stowell v. Eldred (39 Wis. 614), 455.
Stowell v. Robinson (3 Bing. N. C. 928), 447.
Straborn v. Union Stock Yard Co. (43 Ill. 424), 752.
Strain v. Mfg. Co. (80 Tex. 622), 1389.
Stranahan Co. v. Coit (55 Ohio St. 398), 1822.
Strand v. Griffith (38 C. C. A. 444), 934, 1841.
Strang v. Holmes (7 Cow. 224), 1420.
Strang v. Hirst (61 Me. 1), 1424.
Stratton v. Burr (—— Cal. ——), 964.
Straub v. Screven (19 S. C. 445), 571.
Straus v. Minzesheimer (78 Ill. 492), 499, 516, 518.
Straus v. Ross (25 Ind. 300), 508.
Straus v. Rothan (102 Mo. 201), 1482.
Straus v. Wessel (30 Ohio St. 211), 740, 775, 779.
Strauss v. Hensey (7 D. C. App. 289), 1332.
Strauss Saddlery Co. v. Kingman (42 Mo. App. 208), 677.
Strawn v. Cogswell (28 Ill. 457), 1393, 1831.
Streeper v. Eckart (2 Whart. 302), 167, 960.
Street v. Blay (2 B. & Ad. 456), 1805.
Street v. Chapman (29 Ind. 142), 1818.
Strickland v. Graybill (97 Va. 602), 937.
Strickland v. Turner (7 Ex. 208), 199.
Strickland v. Willis (43 S. W. R. 602), 896, 902.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Strodder v. Southern Granite Co. (99 Ga. 595), 74.
Strong v. Insurance Co. (62 Mo. 295), 1834.
Strong v. Dodds (47 Vt. 348), 365, 369.
Strong v. Foote (42 Conn. 203), 130, 132.
Strong v. King (35 Ill. 1), 1433.
Strong v. Lawrence (58 Iowa, 55), 957.
Strong v. Strong (9 Cush. 560), 212.
Strother v. Butler (17 Ala. 733), 17.
Stroud v. Austin (1 C. & A. 119), 1770.
Stroud v. Pierce (6 Allen, 413), 1237.
Strubbee v. Railway Co. (78 Ky. 481), 639.
Strutt v. Smith (1 C. M. & R. 312), 912, 1411.
Stuart v. Burcham (50 Neb. 823), 1448, 1455.
Stuart v. Pennis (91 Va. 688), 1718, 1731.
Stuart v. Wilkins (1 Doug. 21), 932, 1810.
Stubbs v. Lund (7 Mass. 453), 1548, 1577.
Stubly v. Beachboard (68 Mich. 401), 915.
Stucky v. Clyburn (Cheves' L. 186), 1273.
Studer v. Bleisten (115 N. Y. 316), 880, 1272, 1391, 1392, 1395.
Stumph v. Bruner (89 Ind. 556), 973.
Sturges v. Keith (57 Ill. 451), 1786.
Sturgis v. Corp (13 Ves. 190), 135.
Sturgis v. Warren (11 Vt. 433), 645.
Sturm v. Boker (150 U. S. 312), 20, 46, 49.
Sturtevant v. Ballard (9 Johns. 337), 960.
Sturtevant v. Orser (24 N. Y. 538), 1548.
Sturtevant v. Starin (19 Wis. 285), 184.
Stutz v. Coal Co. (131 Pa. St. 267), 660, 669, 1384.
Suan v. Caffe (122 N. Y. 308), 138.
Suit v. Woodhall (113 Mass. 391), 733, 741, 1184.
Sullivan v. Flynn (22 D. C. 396), 72.
Sullivan v. Hergan (17 R. I. 109), 1003.
Sullivan v. Sullivan (70 Mich. 583), 261.
Summer v. Gray (4 Ark. 467), 1795.
Summers v. Hibbard (153 Ill. 102), 1103.
Summers v. Mills (21 Tex. 77), 217.
Summers v. Wilson (2 Cold. 469), 107.
Summerson v. Hicks (134 Pa. St. 566), 32.
Sumner v. Hamlet (12 Pick. 76), 524.
Sumner v. Jones (24 Vt. 317), 1057.
Sumner v. McFarlan (15 Kan. 600), 599.
Sumner v. Saunders (51 Mo. 89), 1445, 1446.
Sumner v. Woods (52 Ala. 94), 583, 599.
Sumner v. Woods (67 Ala. 139), 569, 599.
Sumners v. Vaughn (35 Ind. 323), 1247.
Sumner's Appeal (16 Pa. St. 169), 955.
Sun Pub. Co. v. Minnesota Type Foundry Co. (22 Oreg. 49), 1138, 1375.
Sunny South Lumber Co. v. Neimeyer Lumber Co. (63 Ark. 268), 588, 606.
Surles v. Pipkin (69 N. C. 513), 85.
Susquehanna Fertilizer Co. v. White (66 Md. 444), 1431.
Sussdorf v. Smidt (55 N. Y. 319), 207.
Sutherland v. Allhusen (14 L. T. 666), 1130.
Sutherland v. Brace (34 U. S. App. 638), 485.
Sutherland v. Bruce (73 Fed. R. 624), 492.
Sutherland v. Pratt (11 M. & W. 296), 1430.
Sutton v. Crosly (54 Barb. 80), 1255.
Sutro v. Pettit (74 Cal. 332), 191.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Suydam v. Clark (2 Sandf. 133), 199, 228, 469.
Swallow v. Emery (111 Mass. 355), 634, 635.
Swan v. Scott (11 Serg. & R. 155), 947.
Swann v. Swann (21 Fed. R. 299), 1052, 1058.
Swanzey v. Parker (50 Pa. St. 441), 1303.
Swartwout v. Evans (37 Ill. 442), 189.
Swasey v. Vanderheyden (10 Johns. 33), 124.
Swayne v. Waldo (73 Iowa, 749), 1810.
Sweeney v. Coe (12 Colo. 485), 964.
Sweeney v. Owsley (14 B. Mon. 332), 492, 493.
Sweeney v. United States (109 U. S. 618), 673.
Sweet v. Harding (19 Vt. 587), 1137.
Sweet v. Pym (1 East, 4), 1529.
Sweet v. Shumway (102 Mass. 365), 1213, 1337, 1340.
Swett v. Colgate (20 Johns. 196), 1235, 1311, 1334.
Swift v. Bennett (10 Cush. 436), 128, 132.
Swift v. Rounds (19 R. I. 527), 901.
Swift v. Swift (36 Ala. 147), 688.
Swift v. Thompson (9 Conn. 63), 960.
Switzer v. Pinconning Mfg. Co. (59 Mich. 488), 1235.
Sydnor v. Gee (4 Leigh, 535), 963.
Sydnor v. Roberts (13 Tex. 598), 977.
Sykes v. Dixon (9 Ad. & El. 693), 226.
Sykes v. Giles (5 M. & W. 645), 1455.
Symms v. Benner (31 Neb. 593), 918.
Symns v. Schotten (35 Kan. 310), 1579.
Syracuse Knitting Co. v. Blanchard (69 N. H. 447), 893, 901, 902.
Table Mount. etc. Co. v. Stranahan (20 Cal. 198), 347.
Tabor v. Peters (74 Ala. 90), 1245, 1273.
Tacoma v. Tacoma L. & W. Co. (16 Wash. 288), 877.
Tacoma Coal Co. v. Bradley (2 Wash. 600), 1335, 1344, 1393, 1395, 1811, 1814, 1844.
Taft v. Pike (14 Vt. 405), 109.
Taft v. Travis (136 Mass. 95), 207.
Taggart v. Stanbery (2 McLean, 543), 1281.
Tahoe Ice Co. v. Union Ice Co. (109 Cal. 242), 1690, 1704, 1709.
Talbot Paving Co. v. Gorman (103 Mich. 403), 1344, 1350, 1391, 1392.
Talboys v. Boston (46 Minn. 144), 175, 1449, 1451.
Talcott v. Henderson (31 Ohio St. 162), 906.
Tallman v. Franklin (14 N. Y. 584), 426.
Tally v. Tally (2 Dev. & B. Eq. 385), 84.
Talmadge v. Lane (41 N. Y. Supp. 413), 345.
Talmadge v. Oliver (14 S. C. 522), 571.
Talmage v. Bierhause (103 Ind. 270), 1281, 1282, 1284.
Tamm v. Lavalle (92 Ill. 263), 191.
Tamplin v. James (L. R. 15 Ch. Div. 221), 278.
Tamvaco v. Lucas (1 El. & El. 581), 1158.
Tancred v. Steel Co. (15 App. Cas. 125), 1169.
Tanner v. Scovell (14 M. & W. 28), 1499, 1602.
Tanner Engine Co. v. Hall (89 Ala. 628), 599, 619.
Tansley v. Turner (2 Scott, 238), 515, 518.
Tansley v. Turner (2 Bing. N. C. 151), 1495.
Tappenden v. Randall (2 Bos. & P. 467), 999.
Tarbox v. Gotzian (20 Minn. 139), 263.
Tarling v. Baxter (6 Barn. & Cress. 360), 483, 484, 725.
Tarrabochia v. Corlett (12 Moo. P. C. C. 199), 861.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Tasker v. Bartlett (5 Cush. 359), 1417.
Tasker v. Crane Co. (55 Fed. R. 449), 1377.
Tatro v. Brower (118 Mich. 615), 1822.
Tatum v. Kelley (25 Ark. 209), 1013, 1024.
Tatum v. Mohr (21 Ark. 349), 1270.
Tayloe v. Merchants' F. Ins. Co. (9 How. 390), 257, 258.
Taylor, In re (192 Pa. St. 304), 203, 1032, 1034.
Taylor v. Ashton (11 M. & W. 401), 876, 1223.
Taylor v. Bailey (169 Ill. 181), 175, 1032.
Taylor v. Boardman (25 Vt. 581), 649.
Taylor v. Bowers (1 Q. B. Div. 291), 999.
Taylor v. Bradley (39 N. Y. 129), 1776.
Taylor v. Bullen (5 Ex. 779), 1333.
Taylor v. Caldwell (3 Best & Smith, 826), 1100.
Taylor v. Coenen (L. R. 1 Ch. Div. 636), 973, 974.
Taylor v. Cole (111 Mass. 363), 733, 1177, 1395.
Taylor v. Conner (41 Miss. 722), 1425.
Taylor v. Finley (48 Vt. 78), 606, 610.
Taylor v. Gardiner (8 Manitoba. 310), 1314.
Taylor v. Hilary (1 C. M. & R. 741), 806.
Taylor v. Insurance Co. (9 How. 390), 247.
Taylor v. Jones (L. R. 1 Com. P. Div. 87), 242.
Taylor v. Meads (4 De Gex, J. & S. 597), 135.
Taylor v. Mississippi Mills (47 Ark. 247), 896, 905.
Taylor v. Mueller (30 Minn. 343), 356, 361, 365, 369.
Taylor v. Neville (3 Atk. 384), 1726.
Taylor v. Patrick (1 Bibb, 168), 87.
Taylor v. Rennie (35 Barb. 272), 251.
Taylor v. Robinson (14 Cal. 396), 1455.
Taylor v. Smith (2 Q. B. 65), 427.
Taylor v. Thurber (68 Ill. App. 114), 485.
Taylor v. Victoria Co-operative Store Co. (26 Nova Sco. 223), 1181.
Teachout v. Van Hoesen (76 Iowa, 113), 937.
Tedder v. Odom (2 Heisk. 68), 1025.
Tegler v. Shipman (33 Iowa, 194), 739.
Telegraph Co. v. Railroad Co. (86 Ill. 246), 428.
Telford v. Adams (6 Watts, 429), 947.
Tempest v. Fitzgerald (3 B. & Ald. 680), 385, 386, 1489.
Tempest v. Kilner (3 Com. B. 249), 329, 1748.
Temple v. Smith (13 Neb. 513), 953.
Tenney v. Foote (95 Ill. 99), 1034, 1036.
Tenney v. Mulvaney (9 Oreg. 405), 1265.
Tennent-Stribling Shoe Co. v. Rudy (53 Mo. App. 196), 967.
Tennessee Club v. Dwyer (11 La. Ann. 452), 55.
Tennessee River Compress Co. v. Leeds (97 Tenn. 574), 1346, 1347.
Terhune v. Coker (107 Ga. 352), 936.
Terney v. Doten (70 Cal. 399), 359, 386.
Terre Haute Brewing Co. v. Hartman (19 Ind. App. 596), 1027.
Terry v. Birmingham Nat. Bank (93 Ala. 599), 1786.
Terry v. Bissell (26 Conn. 23), 838, 1849.
Terry v. Cole (80 Va. 701), 9.
Terry v. Wheeler (25 N. Y. 520), 488, 489, 508, 528, 1177.
Terwilliger v. Great West. Tel. Co. (59 Ill. 249), 878.
Tewkesbury v. Bennett (31 Iowa, 83), 1235, 1245, 1246.
Texada v. Beaman (6 La. Ann. 84), 1462.
Textor v. Hutchings (62 Md. 150), 1092.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Thacher v. Dinsmore (5 Mass. 299), 1424.
Thacher v. Moors (134 Mass. 156), 169, 887.
Thacker v. Hardy (L. R. 4 Q. B. Div. 685), 1031.
Thames, etc. Co. v. Beville (100 Ind. 309), 428.
Thayer v. Burchard (99 Mass. 508), 263.
Thayer v. Davis (75 Wis. 205), 488, 492, 493.
Thayer v. Insurance Co. (10 Pick. 326), 247.
Thayer v. Kelley (28 Vt. 19), 200.
Thayer v. Luce (22 Ohio St. 62), 426.
Thayer v. Manley (73 N. Y. 305), 56.
Thayer v. Rock (13 Wend. 53), 335.
Thayer v. Turner (8 Metc. 550), 914.
Thaxter v. Foster (153 Mass. 151), 924.
Thedford v. McClintock (47 Ala. 647), 1024.
Theilen v. Rath (80 Wis. 263), 397.
Theiss v. Theiss (166 Pa. St. 9), 1739.
Theo. Hamm Brewing Co. v. Young (76 Minn. 246), 1029.
Theus v. Dugger (93 Tenn. 41), 138.
Thew v. Miller (73 Iowa, 742), 1786.
Third Nat. Bank v. Armstrong (25 Minn. 530), 620.
Thirlby v. Rainbow (93 Mich. 164), 599, 630.
Thol v. Henderson (8 Q. B. Div. 457), 1762, 1770.
Thomas v. Blackman (1 Coll. 312), 228.
Thomas v. City of Richmond (79 U. S. 349), 1024.
Thomas v. Kerr (3 Bush, 619), 461.
Thomas v. Knowles (128 Mass. 22), 271.
Thomas v. Parsons (87 Me. 203), 588, 597, 603.
Thomas v. Simpson (80 N. C. 4), 1344.
Thomas v. State (37 Miss. 353), 714.
Thomas v. Winchester (6 N. Y. 397), 878.
Thomas Mfg. Co. v. Drew (69 Minn. 69), 603.
Thomas, etc. Mfg. Co. v. Wabash, etc. Ry. Co. (62 Wis. 642), 1790.
Thomason v. Lewis (103 Ala. 426), 619.
Thome v. Colton (27 Iowa, 425), 642.
Thompson v. Adams (93 Pa. St. 55), 197.
Thompson v. Alger (12 Metc. 428), 420, 1695.
Thompson v. Balt. & O. R. Co. (28 Md. 396), 1485, 1514.
Thompson v. Bank (82 N. Y. 1), 1461.
Thompson v. Bertrand (23 Ark. 730), 1272.
Thompson v. Botts (8 Mo. 710), 1273.
Thompson v. Dougherty (12 Serg. & R. 448), 975.
Thompson v. Douglass (35 W. Va. 337), 243, 1374.
Thompson v. Elliott (73 Ill. 221), 1459.
Thompson v. Gardiner (1 C. P. D. 777), 468.
Thompson v. Harvey (86 Ala. 519), 816, 1272, 1273, 1274, 1805.
Thompson v. Howard (31 Mich. 309), 909.
Thompson v. Johnson (55 Minn. 515), 955.
Thompson v. Knickerbocker Ins. Co. (104 U. S. 252), 1073.
Thompson v. Lay (4 Pick. 48), 121.
Thompson v. Libby (34 Minn. 374), 446, 447, 1254, 1256, 1314, 1327, 1391, 1392.
Thompson v. McCullough (31 Mo. 224), 838, 1849.
Thompson v. Paret (94 Pa. St. 275), 600.
Thompson v. Peck (115 Ind. 512), 906, 914, 915, 1424.
Thompson v. Phœnix Ins. Co. (75 Me. 55), 872.
Thompson v. Richardson Drug Co. (33 Neb. 714), 955.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Thompson v. Thompson (4 Cush. 127), 1540.
Thompson v. Thompson (19 Me. 244), 970.
Thompson v. Vinton (121 Mass. 139), 646.
Thompson v. Waters (25 Mich. 223), 142.
Thompson v. Wedge (50 Wis. 642), 1481, 1482.
Thompson v. Wilhite (81 Ill. 356), 964, 1199.
Thompson v. Williams (58 N. H. 243), 998, 1053, 1054.
Thompson v. Yeck (21 Ill. 73), 960.
Thompson Mfg. Co. v. Smith (67 N. H. 409), 967.
Thoms v. Dingley (70 Me. 100), 1817, 1823, 1826.
Thomson-Houston Electric Co. v. Brush-Swan Co. (31 Fed. R. 536), 682.
Thomson-Houston Co. v. Palmer (52 Minn. 174), 1432.
Thoreson v. Minneapolis Harvester Works (29 Minn. 341), 1835.
Thorndike v. Bath (114 Mass. 116), 964, 965, 991.
Thorndike v. Locke (98 Mass. 340), 685, 1695.
Thorne v. First Nat. Bank (37 Ohio St. 254), 960.
Thorne v. McVeagh (75 Ill. 81), 1244.
Thorne v. Prentiss (83 Ill. 99), 881.
Thornton v. Charles (9 M. & W. 802), 468.
Thornton v. Davenport (1 Scam. 296), 960.
Thornton v. Kempster (5 Taunt. 786), 272, 449, 468.
Thornton v. Lawther (169 Ill. 228), 1459.
Thornton v. Meux (M. & M. 43), 468.
Thornton v. Thompson (4 Gratt. 121), 1817.
Thornton v. Wynn (25 U. S. 183), 1805.
Thorpe v. Hanscon (64 Minn. 201), 72.
Thorpe v. Fowler (57 Iowa, 541), 554.
Thrall v. Newell (19 Vt. 202), 835, 1303.
Thrall v. Wright (38 Vt. 494), 131, 132.
Thrash v. Starbuck (145 Ind. 673), 77.
Throughgood's Case (2 Co. R. 9), 266.
Thurber v. Ryan (12 Kan. 453), 1169.
Thuret v. Jenkins (7 Mart. 318), 649.
Thurnell v. Balbirnie (2 Mees. & W. 786), 213, 674.
Thurston v. Blanchard (22 Pick. 18), 914, 915, 919, 928.
Thurston v. Spratt (52 Me. 202), 1302, 1798.
Tibbetts v. Garrish (25 N. H. 41), 103, 121.
Tibbetts v. Horne (65 N. H. 242), 646.
Tice v. Gallup (2 Hun, 446), 1281, 1294.
Ticknor v. McClelland (84 Ill. 471), 960, 964, 1198.
Tifft v. Horton (53 N. Y. 377), 647.
Tigress, The (32 L. Jour. Adm. 97), 1611.
Tilden v. Minor (45 Vt. 196), 1194.
Tilden v. Rosenthal (41 Ill. 386), 1168.
Tilley v. Cook County (103 U. S. 155), 228.
Tilton Safe Co. v. Tisdale (48 Vt. 83), 1349.
Tillinghast v. Holbrook (7 R. I. 230), 97.
Tillman v. Heller (78 Tex. 597), 952.
Tillock v. Webb (56 Me. 100), 1057.
Timmis v. Wade (5 Ind. App. 139), 935.
Timrod v. Schoolbred (1 Bay, 324), 1319.
Tinn v. Hoffman (29 Law Times R., N. S., 273), 233.
Tipton v. Feitner (20 N. Y. 425), 350.
Tipton v. Triplett (1 Metc. 570), 1795.
Tisdale v. Buckmore (33 Me. 461), 914.
Tisdale v. Harris (20 Pick. 9), 331.
Titley v. Enterprise Stone Co. (127 Ill. 457), 1254, 1391.
Titus v. Glens Falls Ins. Co. (81 N. Y. 419), 1072.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850

Titlow v. Titlow (59 Pa. St. 216), 70.
Tobey v. Price (75 Ill. 645), 1079.
Tobias v. Lissberger (105 N. Y. 404), 653, 1134, 1139.
Todd v. Diamond State Iron Co. (8 Houst. 372), 1718, 1727, 1733.
Todd v. Gamble (148 N. Y. 382), 1703.
Tognini v. Kyle (17 Nev. 209), 964.
Tolerton & Stetson Co. v. Anglo-California Bank (— Iowa, —), 1816.
Tomblin v. Callen (69 Iowa, 229), 1031.
Tomkinson v. Balkis Consolidated Co. (2 Q. B. 614), 876.
Tomkinson v. Staight (17 C. B. 697), 395.
Tomlinson v. Morris (12 Ont. R. 311), 1223.
Tomlinson v. Roberts (25 Conn. 477), 599.
Tompkins v. Compton (93 Ga. 520), 996, 1040.
Tompkins v. Haas (2 Pa. St. 74), 351.
Tompkins v. Sheehan (58 N. Y. 617), 399, 454.
Toms v. Wilson (4 B. & S. 442), 1416.
Toney v. McGehee (38 Ark. 427), 973, 974.
Tony v. Zell (149 Pa. St. 458), 1242.
Tootle v. First Nat. Bank (34 Neb. 863), 918.
Topliff v. McKendree (88 Mich. 148), 234.
Torkelson v. Jorgenson (28 Minn. 383), 859, 1225.
Torrey v. Corliss (33 Me. 333), 736.
Totten v. Burbans (91 Mich. 499), 875.
Tourret v. Cripps (48 L. J. Ch. 567), 451.
Towell v. Gatewood (2 Scam. 22), 1242, 1247.
Towell v. Pence (47 Ind. 304), 109.
Towers v. Osborne (1 Strange, 506), 295, 296, 297, 299, 305.
Towle v. Dresser (73 Me. 252), 106.
Towne v. Davis (66 N. H. 396), 493, 499, 502, 541, 546, 547.
Townend v. Drakeford (1 Car. & K. 20), 468.
Townley v. Crump (4 A. & E. 58), 1485, 1487, 1513, 1515.
Townsend's Case (L. R. 13 Eq. 148), 247.
Townsend v. Cowles (31 Ala. 428), 873.
Townsend v. Felthousen (156 N. Y. 618), 937.
Townsend v. Fisher (2 Hilton, 47), 263.
Townsend v. Hargraves (118 Mass. 325), 387, 395, 402, 403, 493, 542, 1193.
Tracy v. Talmage (14 N. Y. 162), 1013, 1015, 1019.
Traders' Nat. Bank of Ft. Worth v. Day (37 Tex. 101), 964.
Trainer v. Morrison (78 Me. 160), 1449, 1450.
Trainer v. Trumbull (141 Mass. 527), 127, 128, 129.
Trapp v. New Birdsall Co. (99 Wis. 458), 1812.
Travers v. Leopold (124 Ill. 431), 40.
Treadwell v. Reynolds (39 Conn. 31), 360.
Treadwell v. Salisbury Mfg. Co. (7 Gray, 393), 141.
Treadwell v. State (99 Ga. 779), 896.
Treadwell v. Whittier (80 Cal. 575), 1780.
Treasurer v. Commercial Coal M. Co. (23 Cal. 370), 1727.
Treat v. Hiles (68 Wis. 344), 347.
Tredway v. Riley (32 Neb. 495), 1043.
Tregelles v. Sewell (7 H. & N. 574), 740, 741, 775, 1180.
Tregent v. Maybee (54 Mich. 226), 909.
Treusch v. Ottenburg (4 C. C. A. 629), 953.
Trevor v. Wood (36 N. Y. 307), 240, 247, 429.
Trice v. Cockran (8 Gratt. 442), 940, 1810.
Trigg v. Clay (88 Va. 330), 1742, 1766.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Trimble v. Stillwell (4 E. D. Smith, 512), 207.
Trimmier v. Thomson (10 S. C. 164), 1260.
Tripp v. Armitage (4 M. & W. 687), 761.
Tripp v. Bishop (56 Pa. St. 424), 449.
Tripp v. Forsaith Mach. Co. (69 N. H. 233), 1650, 1690.
Tripp v. Hasceig (20 Mich. 254), 342.
Tripp Boot & Shoe Co. v. Martin (45 Kan. 765), 1451.
Triplett v. Mansur & Tebbetts Implement Co. (—— Ark. ——), 586, 599.
Troewert v. Decker (51 Wis. 46), 1054.
Trotman v. Wood (16 C. B. 479), 834.
Trotter v. Heckscher (40 N. J. Eq. 612), 1148.
Trounstine v. Sellers (35 Kan. 447), 244, 247.
Trueman v. Hurst (1 T. R. 40), 1214.
Trueman v. Loder (11 Ad. & El. 589), 455, 468, 1264.
Trull v. Hammond (71 Minn. 172), 1453, 1455.
Trumbull v. O'Hara (71 Conn. 172), 1805.
Truxton v. Tait (1 Pennew. 483), 924.
Tucker v. Cady (25 Ill. App. 578), 207.
Tucker v. Humphrey (4 Bing. 516), 1530, 1577.
Tucker v. Lawrence (56 Vt. 467), 253.
Tucker v. Moreland (1 Am. Lead. Cas. 260), 109.
Tucker v. Mowrey (12 Mich. 378), 1053, 1054, 1057.
Tucker v. West (29 Ark. 386), 1054, 1057.
Tucker v. White (125 Mass. 344), 875.
Tucker v. Woods (12 Johns. 190), 226.
Tuckerman v. Hinkley (9 Allen, 452), 1057.
Tufts v. Bennett (163 Mass. 398), 1690.
Tufts v. Brace (103 Wis. 341), 620.
Tufts v. D'Arcambal (85 Mich. 185), 595, 622, 629.
Tufts v. Grewer (83 Me. 412), 1665.
Tufts v. Griffin (107 N. C. 47), 635.
Tufts v. Lawrence (77 Tex. 526), 754, 1701.
Tufts v. McClure (40 Iowa, 317), 1129, 1134.
Tufts v. Plymouth Mining Co. (14 Allen, 407), 431.
Tufts v. Stone (70 Miss. 54), 597.
Tufts v. Sylvester (79 Me. 213), 1592, 1594.
Tufts v. Weinfield (88 Wis. 647), 1702.
Tufts v. Wynne (45 Mo. App. 42), 635.
Tull v. David (45 Mo. 444), 461, 462.
Tunell v. Larson (39 Minn. 269), 964.
Tunke v. Allen (54 Neb. 407), 1690.
Tupper v. Cadwell (12 Metc. 559), 130, 131, 132.
Turley v. Bates (2 H. & C. 200), 484, 524, 529.
Turner v. Gaither (83 N. C. 357), 102, 105, 121, 130, 132.
Turner v. Iowa Nat. Bank (2 Wash. 192), 955.
Turner v. Liverpool Dock Trustees (6 Ex. 543), 735, 775, 779, 785, 787, 796, 1548, 1550.
Turner v. Lorrilard Co. (100 Ga. 645), 426, 438, 448.
Turner v. Machine Co. (97 Mich. 166), 660, 1382, 1384.
Turner v. Mason (65 Mich. 662), 310.
Turner v. Moore (58 Vt. 455), 543.
Tustin Fruit Ass'n v. Earl Fruit Co. (121 Cal. xviii), 1642.
Tuteur v. Chase (66 Miss. 476), 952, 953.
Tuthill v. Skidmore (124 N. Y. 148), 1476, 1502, 1513, 1623.
Tuttle v. Bean (13 Metc. 275), 1080.
Tuttle v. Brown (4 Gray, 457), 1244, 1269.
Tuttle v. Holland (43 Vt. 542), 1027.
Tuxworth v. Moore (9 Pick. 347), 491, 788, 964, 1193.
Tweed v. Mills (1 Com. Pl. 39), 197.
Twyne's Case (3 Coke, 80), 960, 970.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Tye v. Fynmore (3 Camp. 462), 1321.
Tyers v. Rosedale Iron Co. (L. R. 10 Exch. 195), 1151, 1153.
Tyler v. Augusta (88 Me. 504), 1812.
Tyler v. Carlisle (79 Me. 210), 999.
Tyler v. Freeman (3 Cush. 261), 546.
Tyler v. Strong (21 Barb. 198), 518, 524.
Tyre v. Causey (4 Harr. 425), 1242, 1268.
Tyson v. Post (108 N. Y. 217), 645.
Ubben v. Binnian (182 Ill. 508), 1037.
Uecker v. Koehn (21 Neb. 559), 100.
Ufford v. Winchester (69 Vt. 542), 601.
Uhler v. Semple (20 N. J. Eq. 288), 1242.
Ullman v. Kent (60 Ill. 271), 1633.
Umfrid v. Brookes (14 Wash. 675), 1129.
Underwood v. Caldwell (102 Ga. 16), 937, 1391.
Underwood v. Wolf (131 Ill. 425), 1392, 1393, 1395, 1844.
Unexcelled Fire Works Co. v. Polites (130 Pa. St. 536), 1091, 1092, 1674, 1690, 1701, 1702.
Union Hide & Leather Co. v. Reissig (48 Ill. 75), 1344, 1352.
Union Canal Co. v. Young (1 Whart. 410), 924.
Union National Bank v. Carr (15 Fed. R. 438), 1034.
Union National Bank v. Miller (106 N. C. 347), 244, 251.
Union National Bank v. Pray (44 Minn. 168), 974.
Union Pac. R. Co. v. Johnson (45 Neb. 57), 792.
Union Pac. Ry. Co. v. Smersh (22 Neb. 751), 950.
Union School Furn. Co. v. Mason (3 S. Dak. 147), 1455.
Union Stock Yard Co. v. Mallory (157 Ill. 554), 491, 908.
Union Stock Yards v. Western Land Co. (59 Fed. R. 49), 20.
United Society v. Brooks (145 Mass. 410), 336.
United States v. Behan (110 U. S. 338), 1713.
United States v. Cline (26 Fed. R. 515), 740.
United States v. Peck (102 U. S. 64), 1106.
United States v. Shriver (23 Fed. R. 134), 740, 794, 1029.
United States v. Smoot (21 L. Ed. 107), 1090.
United States v. Speed (75 U. S. 77), 1702.
United States v. Wilkins (6 Wheat. 135), 213.
United States Fire Alarm Co. v. Big Rapids (78 Mich. 67), 668.
United States School Furniture Co. v. Board of Education (—— Ky. ——), 175.
Upham v. Dodd (24 Ark. 545), 714.
Upham v. Richey (163 Ill. 530), 39.
Upson v. Holmes (51 Conn. 500), 498, 527, 529.
Upton v. Sturbridge Cotton Mills (111 Mass. 446), 549, 553, 740.
Upton v. Suffolk Mills (11 Cush. 586), 1281, 1290.
Upton v. Tribilcock (91 U. S. 45), 872.
Upton Mfg. Co. v. Huiske (69 Iowa, 557), 816, 818, 819, 1384, 1805.
Usher v. Hazeltine (5 Greenl. 471), 950.
Utica Ins. Co. v. Kip (8 Cow. 20), 999.
Utley v. Donaldson (94 U. S. 29), 217, 234, 1303.
Vail v. Reynolds (118 N. Y. 297), 1843.
Vail v. Strong (10 Vt. 457), 16, 1810.
Vail v. Winterstein (94 Mich. 230), 138.
Valerius v. Hockspiere (87 Iowa, 332), 1255.
Valle v. Cerre (36 Mo. 575), 51, 752.
Valley Distilling Co. v. Atkins (50 Ark. 289), 960.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Valley Iron Works v. Grand Rapids F. Mill (85 Wis. 274), 1387.
Valpy v. Gibson (4 C. B. 837), 206, 438, 1559.
Valpy v. Oakeley (16 Q. B. 941), 1513, 1515, 1690, 1737.
Vance v. Schroyer (79 Ind. 380), 914.
Vannerson v. Cheatham (41 S. C. 327), 138.
Van Allen v. Francis (123 Cal. 474), 564, 566, 632.
Van Bracklin v. Fonda (12 Johns. 468), 1357.
Van Brocklen v. Smeallie (140 N. Y. 70), 1618, 1623, 1624, 1633, 1637, 1643, 1682.
Van Brunt v. Pike (4 Gill, 270), 381, 964.
Van Casteel v. Booker (2 Ex. 691), 735, 774, 775, 779, 787, 796, 1547, 1550.
Vandegrift v. Cowles, etc. Co. (161 N. Y. 435), 1106.
Vandenbergh v. Spooner (L. R. 1 Ex. 316), 430, 434.
Vanderbilt v. Central R. R. Co. (43 N. J. Eq. 669), 363.
Vanderbilt v. Eagle Iron Works (25 Wend. 665), 1161.
Vanderhost v. MacTaggart (1 Brev. 269), 1320.
Vanderkarr v. Thomson (19 Mich. 82), 342.
Van Deusen v. Sweet (51 N. Y. 378), 69, 72, 77.
Van Duzor v. Allen (90 Ill. 499), 546, 600.
Van Epps v. Harrison (5 Hill, 63), 937, 940.
Van Eps v. Schenectady (12 Johns. 436), 351.
Van Hoesen v. Cameron (54 Mich. 609), 1264.
Van Hoozer v. Cory (34 Barb. 12), 200.
Van Hoven v. Irish (10 Fed. R. 13), 1057.
Van Horn v. Rucker (33 Mo. 391), 1643, 1677.
Van Keuren v. Corkins (4 Hun, 129), 1453.
Vanmeter v. Estill (78 Ky. 456), 960.
Vanmeter v. Spurrier (94 Ky. 22), 1050.
Van Patton v. Beals (46 Iowa, 62), 73.
Van Raalte v. Harrington (101 Mo. 602), 953.
Van Range Co. v. Allen (— Miss. —), 599.
Van Schoick v. Niagara Ins. Co. (68 N. Y. 434), 1272.
Van Toll v. South Eastern Ry. Co. (12 C. B. 75), 845.
Van Valkenburgh v. Gregg (45 Neb. 654), 1124, 1128, 1195, 1217, 1374.
Van Winkle v. Crowell (146 U. S. 42), 1387.
Van Winkle v. Wilkins (81 Ga. 93), 1251. 1817.
Van Wren v. Flynn (34 La. Ann. 1158), 627.
Van Wyck v. Allen (69 N. Y. 61), 1237, 1334, 1354, 1827.
Van Wyck v. Brasker (81 N. Y. 260), 87, 89.
Van Wyck v. Seward (18 Wend. 375), 971.
Varley v. Whipp (1 Q. B. 513), 1209, 1333.
Varner v. Nobleborough (2 Greenlf. 121), 1424.
Varney v. Young (11 Vt. 258), 186.
Varnum v. Highgate (65 Vt. 416), 276.
Vasse v. Smith (6 Cranch, 231), 120.
Vassar v. Camp (11 N. Y. 441), 250.
Vassau v. Campbell (79 Minn. 167), 1154.
Vasser v. Buxton (86 N. C. 335), 583, 599.
Vaughn v. Hopson (10 Bush. 337), 600
Vaughn v. McFayden (110 Mich. 234), 606.
Vawter v. Griffin (40 Ind. 593), 331.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Veal v. Fortson (57 Tex. 482), 97.
Veasey v. Somerby (5 Allen, 280), 1201.
Velsain v. Lewis (15 Oreg. 549), 156.
Vennard v. McConnell (11 Allen, 562), 1540.
Vent v. Osgood (19 Pick. 572), 109, 123.
Vermont Farm Mach. Co. v. Batchelder (68 Vt. 430), 1251.
Vermont Marble Co. v. Brow (109 Cal. 236), 588, 597.
Vernon v. Keys (12 East, 632), 900.
Vescelius v. Martin (11 Colo. 391), 179.
Vickers v. Vickers (L. R. 4 Eq. 529), 213, 674.
Vickery v. McCormick (117 Ind. 598), 1737, 1775.
Victor Sewing Mach. Co. v. Heller (44 Wis. 265), 169.
Vierling v. Iroquois Furnace Co. (170 Ill. 189), 1254.
Vincent v. Cornell (13 Pick. 294), 573, 693.
Vincent v. Germond (11 Johns. 283), 402.
Vincent v. Leland (100 Mass. 432), 1248, 1395, 1811.
Vining v. Gilbraith (39 Me. 496), 380, 981.
Vinz v. Beatty (61 Wis. 645), 1058.
Virtue v. Beacham (17 N. Y. Supp. 450), 227.
Vogel v. State (107 Ind. 374), 1136.
Vogelsang v. Fisher (128 Mo. 386), 1565.
Voltz v. Voltz (75 Ala. 555), 101.
Voorhees v. Earle (2 Hill, 288), 912, 1805, 1817.
Voorhees v. Wait (15 N. J. L. 343), 109.
Voorhis v. Olmstead (66 N. Y. 113), 1516.
Vorse v. Loomis (86 Iowa, 522), 603.
Vose v. Deane (7 Mass. 280), 191.
Vote v. Karrick (13 Colo. App. 388), 964.
Vulicevich v. Skinner (77 Cal. 239), 344.
Vusler v. Cox (53 N. J. L. 516), 183.
Wabash Elevator Co. v. Bank (23 Ohio St. 311), 543, 554, 1407, 1437.
Wabash W. Ry. Co. v. Friedman (146 Ill. 583), 1780.
Wachsmuth v. Martini (154 Ill. 515), 897.
Wackerbarth v. Masson (3 Camp. 270), 1130.
Waddington v. Oliver (5 Bos. & Pul. 61), 1161.
Wade v. Colvert (2 Mill, 27), 86.
Wade v. Hamilton (30 Ga. 450), 51, 736, 752.
Wade v. Moffett (21 Ill. 110), 483.
Wadham & Co. v. Balfour (32 Oreg. 313), 378, 380, 499, 731, 1194.
Wadleigh v. Buckingham (80 Wis. 230), 583.
Wadsworth v. Dunnam (117 Ala. 661), 1004, 1053, 1054.
Wadswords v. Sharpsteen (8 N. Y. 388), 69.
Wagar v. Detroit, etc. R. Co. (79 Mich. 648), 499, 702.
Wager v. Hall (83 U. S. 584), 1540.
Wagner v. Breed (29 Neb. 720), 741.
Wagner v. Hallack (3 Colo. 176), 740, 794.
Wagner v. Hildebrand (187 Pa. St. 136), 1039.
Wagner v. Nagel (33 Minn. 348), 183, 185.
Wailing v. Toll (9 Johns. 141), 129, 132.
Wait v. Baker (2 Ex. 1), 393, 721, 740, 742, 757, 774, 775, 782, 784, 787, 792, 796, 1181, 1496.
Wait v. Borne (123 N. Y. 592), 1281, 1293.
Wait v. Maxwell (5 Pick. 217), 72.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Waite v. McKelvey (71 Minn. 167), 365.
Wake v. Griffin (9 Neb. 47), 960.
Wake v. Harrop (6 H. & N. 768), 448.
Wakefield Rattan Co. v. Tappan (70 Hun, 405), 893, 895.
Wakeman v. Dalley (51 N. Y. 27), 875.
Wakeman v. Wheeler & Wilson Mfg. Co. (101 N. Y. 205), 1763, 1765, 1776.
Walburn-Swenson Co. v. Darrell (49 La. Ann. 1044), 647.
Walden v. Murdock (23 Cal. 540), 380, 1132.
Waldo v. Belcher (11 Ired. 609), 714.
Waldron v. Chase (37 Me. 414), 702, 708, 711, 714, 1413.
Waldron v. Haupt (2 P. F. Smith, 408), 580.
Walker v. Blake (37 Me. 373), 676.
Walker v. Borland (21 Mo. 289), 1787.
Walker v. Boulton (3 U. C. Q. B. 252), 361.
Walker v. Butterick (106 Mass. 237), 49.
Walker v. Collier (37 Ill. 362), 723, 981, 982.
Walker v. Davis (65 N. H. 170), 1155.
Walker v. Davis (1 Gray, 506), 120.
Walker v. Denison (86 Ill. 142), 257.
Walker v. Ferrin (4 Vt. 523), 109.
Walker v. Herring (21 Gratt. 678), 461.
Walker v. Hoisington (43 Vt. 608), 1270.
Walker v. Hyman (1 Ont. App. 345), 599.
Walker v. Lovell (28 N. H. 138), 1004.
Walker v. McConnico (10 Yerg. 228), 947.
Walker v. Nusey (16 M. & W. 302), 404, 416, 420.
Walker v. Pue (57 Md. 155), 1349.
Walker v. Staples (5 Allen, 34), 39.
Walker v. Supple (54 Ga. 178), 331.
Walker v. Tucker (70 Ill. 527), 1103.
Wall v. De Mitkiewicz (9 D. C. App. 109), 628.
Wall v. Hill (1 B. Mon. 290), 77.
Wall v. Schneider (59 Wis. 352), 203, 1031, 1032, 1034, 1035.
Wallace v. Hallowell (56 Minn. 501), 1843.
Wallace v. Jorman (2 Stark. 162), 932.
Wallace v. Lark (12 S. C. 576), 1013, 1025.
Wallace v. Mayor (29 Cal. 181), 191.
Wallace v. Penfield (106 U. S. 260), 973.
Wallace v. Rowley (91 Ind. 586), 138.
Waller v. Todd (3 Dana, 503), 960.
Walley v. Montgomery (3 East, 585), 772, 775.
Wallis v. Bardwell (126 Mass. 366), 132.
Wallis Tobacco Co. v. Jackson (99 Ala. 460), 188.
Walradt v. Brown (1 Gilm. 397), 970.
Walsh v. Blakely (6 Mont. 194), 1542.
Walsh v. Byrnes (39 Minn. 527), 974.
Walsh v. Morse (80 Mo. 568), 875.
Walsh v. Myers (92 Wis. 397), 264, 1092.
Walsh v. Taylor (39 Md. 592), 626, 627.
Walsh v. Young (110 Mass. 396), 109, 118.
Walter v. Everard (2 Q. B. 369), 132.
Walter v. Jones (148 Pa. St. 589), 138.
Walter v. Reed (34 Neb. 544), 1121, 1407.
Walton v. Black (5 Houst. 149), 1127, 1130.
Walton v. Lowrey (74 Miss. 484), 336.
Walton v. Tusten (49 Miss. 569), 947.
Wanamaker v. Yerkes (70 Pa. St. 443), 1485, 1499, 1515.
Wangler v. Franklin (70 Mo. 659), 599.
Wanser v. Messler (29 N. J. L. 256), 1795.
Waples v. Overaker (77 Tex. 7), 1633.
Warbasse v. Card (74 Iowa, 306), 1254.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Ward v. Bourne (56 Mo. 161), 1424.
Ward v. Evans (2 Ld. Raym. 928), 455.
Ward v. Howe (38 N. H. 35), 1432.
Ward v. Shaw (7 Wend. 404), 524, 535.
Ward v. Smith (7 Wall. 447), 1455.
Ward v. Taylor (56 Ill. 494), 748, 774, 1183.
Ward v. Vosburgh (31 Fed. R. 12), 1031, 1032.
Ward v. Ward (75 Minn. 269), 1052.
Ward's Estate, In re (57 Minn. 377), 683.
Wardell v. Fosdick (13 Johns. 325), 932.
Wardell v. Williams (62 Mich. 50), 228, 234, 439, 443.
Warden v. Marshall (99 Mass. 305), 1202, 1490.
Warder, Bushnell, etc. Co. v. Horne (—— Iowa, ——), 1382.
Warder v. Fisher (48 Wis. 338), 1395.
Warder v. Hoover (51 Iowa, 491), 549.
Warder v. Robertson (75 Iowa, 585), 1286, 1386.
Warder v. Rublee (42 Minn. 23), 156.
Warder v. Whitish (77 Wis. 430), 668, 881, 934.
Ware v. Jones (61 Ala. 288), 1013.
Ware v. McCormack (96 Ky. 139), 1332.
Ware v. Wheatnall (2 McCord, 413), 1794.
Ware River R. Co. v. Vibbard (114 Mass. 447), 1474.
Waring v. Ayres (40 N. Y. 357), 437.
Waring v. Mason (18 Wend. 425), 1212, 1320, 1325, 1327, 1352.
Warner v. Arctic Ice Co. (74 Me. 475), 1213, 1340.
Warner v. Benjamin (89 Wis. 290), 1843.
Warner v. Carlton (22 Ill. 415), 966.
Warner v. Johnson (65 Iowa, 126), 603.
Warner v. Littlefield (89 Mich. 329), 955.
Warner v. Norton (20 How. 448), 960.
Warner v. Roth (2 Wyo. 63), 599.
Warner v. Vallily (13 R. I. 483), 919, 928.
Warnken v. Langdon Co. (8 N. Dak. 243), 612.
Warnock v. Campbell (25 N. J. Eq. 485), 87.
Warren v. Chapman (105 Mass. 187), 1004.
Warren v. Crane (50 Mich. 300), 1071.
Warren v. Hodge (121 Mass. 106), 1419.
Warren v. Liddell (110 Ala. 232), 564, 646, 647.
Warren v. Milliken (57 Me. 97), 708.
Warren v. Philadelphia Coal Co. (83 Pa. St. 437), 1235.
Warren v. Skinner (20 Conn. 559), 1419, 1420.
Warren v. Stoddart (105 U. S. 224), 1755, 1770.
Warren v. Thread Co. (134 Mass. 247), 197.
Warren v. Wheeler (8 Metc. 97), 446, 499, 520, 702, 1082, 1131.
Warren Chemical Co. v. Holbrook (118 N. Y. 586), 305.
Warren & Durfee Mfg. Co. v. Watson (92 Iowa, 759), 1813.
Warren Glass Works v. Coal Co. (65 Md. 547), 1311, 1314, 1319.
Warten v. Strane (82 Ala. 311), 714.
Wartman v. Breed (117 Mass. 18), 373, 658, 661.
Warwick v. Slade (3 Camp. 127), 468.
Washburn v. Cuddihy (8 Gray, 430), 1270.
Washburn v. Fletcher (42 Wis. 152), 247.
Washburn v. Franklin (35 Barb. 599), 1048.
Washburn Iron Co. v. Russell (130 Mass. 543), 1128, 1189.
Washington v. Johnson (7 Humph. 468), 659, 660.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Washington Ice Co. v. Webster (62 Me. 341), 228, 234, 355, 1742.
Washington Slate Co. v. Burdick (60 Minn. 270), 1423.
Wass v. Insurance Co. (61 Me. 537), 1450.
Wassenboehr v. Boulier (84 Me. 165), 1029.
Wassenboehr v. Morgan (168 Mass. 291), 1027.
Waterbury v. Andrews (67 Mich. 281), 878.
Waterhouse v. Citizens' Bank (25 La. Ann. 77), 1455.
Waterhouse v. Skinner (2 Bos. & P. 447), 1188.
Waterman v. Clark (76 Ill. 428), 1079.
Waterman v. Meigs (4 Cush. 497), 307, 437, 438.
Waters v. Cox (2 Ill. App. 129), 649.
Waters v. Riggin (19 Md. 536), 150.
Waters v. Towers (8 Ex. 40), 1831.
Waters Heater Co. v. Mansfield (48 Vt. 378), 682, 1384.
Watertown S. C. Co. v. Davis (5 Del. 192), 569, 627.
Watkins v. Hodges (6 H. & J. 38), 1151.
Watkins v. Paine (57 Ga. 50), 738, 1380, 1392.
Watkins v. Petefish (49 Ill. App. 80), 964.
Watkins v. Wyatt (9 Baxt. 250), 202.
Watt v. Wisconsin Cranberry Co. (63 Iowa, 730), 429, 445.
Wattau v. Fenwick (1 Q. B. Div. 346), 188.
Watte v. Wickersham (27 Neb. 457), 1031.
Watson v. Alberts (120 Mich. 508), 646.
Watson v. Billing (38 Ark. 278), 108.
Watson v. Cheshire (18 Iowa, 202), 1332.
Watson v. Cross (2 Duvall, 147), 132.
Watson v. Denton (7 C. & P. 85), 1270.
Watson v. Kirby (112 Ala. 436), 1831.
Watson v. Lisbon Bridge (14 Me. 201), 1826.
Watson v. Needham (161 Mass. 404), 1773.
Watson v. Rodgers (53 Cal. 401), 963.
Watson v. Roode (30 Neb. 264), 1273.
Watson v. Rowe (16 Vt. 525), 1277.
Watson v. Silsby (166 Mass. 57), 901, 905, 906.
Watson v. Spratley (10 Ex. 222), 329.
Watson v. Stever (25 Mich. 386), 17, 1411.
Watson Coal, etc. Co. v. Casteel (68 Ind. 476), 856.
Watts v. Friend (10 B. & C. 446), 345, 352.
Watts v. Hendry (13 Fla. 523), 702, 709, 711.
Watts v. Howard (70 Minn. 122), 175.
Waugh v. Beck (114 Pa. St. 422), 1031.
Waugh v. Morris (L. R. 8 Q. B. 202), 1007, 1008.
Way v. Martin (140 Pa. St. 499), 1235, 1248, 1249.
Way v. Ryther (165 Mass. 226), 937.
Way v. Wakefield (7 Vt. 228), 16.
Weatherbee v. Cockrell (44 Kan. 380), 947.
Weatherby v. Higgins (6 Ind. 73), 342.
Weathersly v. Weathersley (40 Miss. 462), 692.
Weaver v. Burr (31 W. Va. 736), 227, 229, 244.
Weaver v. Nixon (69 Ga. 699), 1433.
Weaver v. Nugent (72 Tex. 272), 955.
Weaver v. Shriver (79 Md. 530), 936.
Webb v. Baltimore & East Shore Ry. Co. (77 Md. 92), 331.
Webb v. Brooke (3 Taunt. 6), 1012, 1015.
Webb v. Fairmaner (3 Mees. & Wels. 331), 1135.
Webb v. Odell (49 N. Y. 583), 276.
Webber v. Donnelly (33 Mich. 469), 1013, 1027.
Webber v. Howe (36 Mich. 150), 365.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Webber v. Minor (6 Bush, 463), 1694.
Weber v. Baessler (3 Colo. App. 459), 1559, 1590.
Weber v. Rothchild (15 Oreg. 385), 954.
Webster v. Anderson (42 Mich. 554), 390, 964.
Webster v. Bailey (31 Mich. 36), 863, 875, 881.
Webster v. Bailey (40 Mich. 641), 923, 924.
Webster v. Bainbridge (13 Hun, 180), 1428.
Webster v. Brown (67 Mich. 328), 438.
Webster v. Cecil (30 Beav. 62), 278, 854.
Webster v. Granger (78 Ill. 230), 491, 1194, 1320.
Webster v. Hodgkins (25 N. H. 128), 1255.
Webster v. Munger (8 Gray, 584), 1013, 1019, 1027.
Webster v. Peck (31 Conn. 495), 960.
Webster v. Whitworth (49 Ala. 201), 1455.
Webster v. Wyser (1 Stew. 184), 1467.
Webster v. Zielly (52 Barb. 482), 345.
Webster-Gruber Marble Co. v. Dryden (90 Iowa, 37), 1154.
Weddigen v. Boston Elastic Co. (100 Mass. 422), 1436.
Weed v. Beebe (12 Vt. 495), 109.
Weed v. Dyer (53 Ark. 155), 1344.
Weed v. Jewett (2 Met. 608), 200.
Weedon v. Clark (94 Ala. 505), 492.
Weeks v. Pike (60 N. H. 447), 599.
Weeks v. Prescott (53 Vt. 57), 960.
Wegenaar v. Dechow (33 N. Y. App. Div. 12), 935.
Wegg v. Drake (16 U. C. Q. B. 252), 359.
Weiden v. Woodruff (38 Mich. 130), 253, 255, 1255.
Weil v. Golden (141 Mass. 364), 733.
Weil v. State (46 Ohio St. 450), 603, 629.
Weiland v. Krejnick (63 Minn. 314), 30.
Weiland v. Sunwall (63 Minn. 320), 20, 30.
Weill v. American Metal Co. (182 Ill. 128), 1081, 1130, 1705.
Weimer v. Clement (37 Pa. St. 147), 1235, 1311.
Weinstein v. Freyer (93 Ala. 257), 599, 649.
Weir v. Bell (3 Ex. Div. 238), 876.
Weir v. Day (57 Iowa, 84), 970.
Weir v. Hudnut (115 Ind. 525), 411.
Welby v. Armstrong (21 Ind. 489), 947.
Welch v. Burdick (101 Iowa, 70), 937, 942.
Welch v. Clifton Mfg. Co. (55 S. C. 568), 187.
Welch v. Moffatt (1 N. Y. Sup. 575), 1161.
Welch v. National Cash Reg. Co. (— Ky. —), 603.
Welch v. Olmstead (90 Mich. 492), 936.
Welch v. Spies (103 Iowa, 389), 496, 498.
Weld v. Came (98 Mass. 152), 760, 1189, 1198.
Weld v. Cutler (2 Gray, 195), 702, 703, 714.
Weld v. Nichols (17 Pick. 538), 1798.
Welde v. Scotten (59 Md. 72), 970.
Weller's Appeal (103 Pa. St. 594), 266.
Wellington v. Oil Co. (104 Mass. 64), 878.
Wells v. Alexandre (130 N. Y. 642), 264.
Wells v. Cook (16 Ohio St. 67), 878.
Wells v. Day (124 Mass. 32), 351.
Wells v. Railway Co. (30 Wis. 605), 429.
Wells v. Spears (1 McCord, 421), 1260.
Wellston Coal Co. v. Franklin Paper Co. (58 Ohio St. 182), 1713.
Welsh v. Bell (32 Pa. St. 12), 643.
Welsh v. Carter (1 Wend. 185), 1311.
Welsh v. Gossler (89 N. Y. 540), 1139.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Welter v. Hill (65 Minn. 273), 202.
Wemple v. North Dak. Elev. Co. (67 Minn. 87), 228.
Wendall v. Osborne (63 Iowa, 100), 1384.
Wentworth v. Outhwaite (10 Mees. & W. 535), 1577.
Wentworth v. Woods Mach. Co. (163 Mass. 28), 599.
Werder, In re (15 Fed. R. 789), 197.
Wertheimer-Schwartz Shoe Co. v. Faris (46 S. W. R. 336), 892, 901.
West v. Anderson (9 Conn. 107), 933.
West v. Bechtel (—— Mich. ——), 1147, 1148.
West v. Cunningham (9 Port. 104), 1626, 1643.
West v. Emery (17 Vt. 583), 1810.
West v. Graff (23 Ind. App. 410), 905.
West v. Humphrey (21 Nev. 80), 1181.
West v. Platt (127 Mass. 367), 553.
West v. Russell (48 Mich. 74), 64.
West Jersey R. Co. v. Trenton Car Works (32 N. J. L. 517), 755.
West Philadelphia Nat. Bank v. Field (143 Pa. St. 473), 1422.
West Va. Trans. Co. v. Ohio River Pipe-Line Co. (22 W. Va. 600), 208.
Wescott v. Delano (20 Wis. 514), 341.
Westcott v. Thompson (18 N. Y. 363), 676.
Western Bank of Scotland v. Addie (L. R. 1 H. L. Sc. 145), 876.
Western Security Co. v. Douglas (14 Wash. 215), 1453.
Western Twine Co. v. Wright (11 S. Dak. 521), 1817, 1837.
Western Union Tel. Co. v. American Union Tel. Co. (65 Ga. 160), 208.
Western Union Tel. Co. v. Semmes (73 Md. 9), 1097.
Westfall v. Jones (23 Barb. 9), 947.
Westheimer v. Weisman (60 Kan. 753), 1028.
Westmoreland v. Powell (59 Ga. 256), 970.
Weston v. Brown (158 N. Y. 360), 601.
Weston v. Card (96 Mich. 373), 1384.
Weston v. McDowell (20 Mich. 353), 330, 331.
Westurn v. Page (94 Wis. 251), 1281, 1294.
Westzinthus, Matter of (5 B. & Ad. 817), 1568.
Wetherbee v. Green (22 Mich. 311), 639, 640.
Wetherill v. Neilson (20 Pa. St. 448), 1230.
Wetmore v. McDougall (32 Mich. 276), 909.
Wetmore v. Neuberger (44 Mich. 362), 336.
Weyand v. Railway Co. (75 Iowa, 573), 782.
Weybrick v. Harris (31 Kan. 92), 816, 1805, 1817.
Weymouth v. Sanborn (43 N. H. 171), 1423.
Whaley v. Hinchman (22 Mo. App. 483), 429.
Wharton v. Mackenzie (5 Q. B. 606), 132.
Wheadon v. Olds (20 Wend. 174), 274, 831, 839, 1846, 1850.
Wheat v. Cross (31 Md. 99), 247, 258, 276.
Wheaton v. Baker (14 Barb. 594), 919.
Wheaton v. East (5 Yerg. 41), 95.
Wheaton Roller Mill Co. v. Noye Mfg. Co. (66 Minn. 156), 1254.
Wheeden v. Fisk (50 N. H. 125), 804.
Wheeler v. Kanst (46 Wis. 398), 960.
Wheeler v. New Brunswick, etc. R. R. Co. (115 U. S. 29), 264.
Wheeler v. Nichols (32 Me. 233), 964.
Wheeler v. Reed (36 Ill. 81), 1245, 1246.
Wheeler v. Russel (17 Mass. 258), 1045, 1050.
Wheeler v. Selden (63 Vt. 429), 960, 964, 966.
Wheeler v. Sumner (4 Mason, 183), 987, 1201.

References are to sections: Vol. I, §§ 1–797; Vol. II, §§ 798–1850.

Wheeler v. Wheeler (2 Metc. 474), 200.
Wheeler v. Wheeler (11 Vt. 60), 1419.
Wheeler v. Wheelock (33 Vt. 144), 1810.
Wheeler v. Wheelock (34 Vt. 553), 868.
Wheeler & Wilson Co. v. Irish-American Bank (105 Ga. 57), 153, 549.
Wheeler & Wilson Mfg. Co. v. Jacobs (2 N. Y. Misc. R. 236), 630.
Wheeler & Wilson Mfg. Co. v. Keeler (65 Hun, 508), 906.
Wheeler & Wilson Mfg. Co. v. Morgan (29 Kan. 519), 178.
Wheeler & Wilson Mfg. Co. v. Teetzlaff (53 Wis. 211), 628.
Wheeler & Wilson Mfg. Co. v. Thompson (33 Kan. 491), 1817.
Wheelhouse v. Parr (141 Mass. 593), 737, 746, 1182.
Wheeling, etc. R. Co. v. Koontz (61 Ohio St. 551), 1562, 1563, 1565, 1578, 1583.
Wheelock v. Berkely (138 Ill. 153), 1818.
Wheelton v. Hardisty (8 E. & B. 232), 861.
Whelan v. Couch (26 Grant Ch. 74), 569.
Whelan v. Reilly (61 Mo. 565), 457.
Whipple v. Gilpatrick (19 Me. 427), 599.
Whipple v. Thayer (16 Pick. 25), 788.
Whitaker v. Brown (— Tex. Civ. App. —), 905.
Whitaker v. Eastwick (75 Pa. St. 229), 1302.
Whitaker v. Hueske (29 Tex. 355), 1320.
Whitaker v. McCormick (6 Mo. App. 114), 1345, 1354, 1834.
Whitaker v. Sumner (20 Pick. 399), 39.
Whitbeck v. Van Ness (11 Johns. 409), 1423, 1425.
Whitcomb v. Denio (52 Vt. 382), 915.
Whitcomb v. Joslyn (51 Vt. 79), 109.
Whitcomb v. Whitney (24 Mich. 486), 489, 754.
Whitcomb v. Woodworth (54 Vt. 544), 569, 603.
White, Ex parte (L. R. 6 Ch. App. 397), 45, 49.
White v. Barber (123 U. S. 392), 1039.
White v. Beeton (7 H. & N. 42), 1075.
White v. Branch (51 Ind. 210), 109.
White v. Buss (3 Cush. 448), 1019.
White v. Cox (3 Hayw. 79), 86, 90.
White v. Crew (16 Ga. 416), 947.
White v. Elwell (48 Me. 360), 334.
White v. Foster (102 Mass. 375), 336.
White v. Franklin Bank (22 Pick. 181), 999, 1001.
White v. Garden (10 C. B. 919), 148.
White v. Harvey (85 Me. 212), 1186.
White v. Hendrie (38 Mich. 390), 1595.
White v. Langdon (30 Vt. 599), 601.
White v. Miller (71 N. Y. 118), 1334, 1827.
White v. Miller (7 Hun, 427), 1354.
White v. Mitchell (38 Mich. 390), 924, 1588, 1589.
White v. McCracken (60 Ark. 613), 485, 492, 964, 1198.
White v. Oakes (89 Me. 367), 629, 1247, 1316, 1346.
White v. Pease (15 Utah, 170), 967, 1132.
White v. Proctor (4 Taunt. 209), 461.
White v. Solomon (164 Mass. 516), 1415, 1671, 1675, 1687, 1694, 1695, 1698.
White v. Stelloh (74 Wis. 435), 1235, 1266, 1314, 1316, 1355.
White v. Toncray (9 Leigh, 347), 1171.
White v. Welsh (38 Pa. St. 396), 1501, 1515.
White v. Wilks (5 Taunt. 176), 702, 711.
White Water Valley Canal Co. v. Valette (21 How. 424), 141.
Whitefield v. McLeod (2 Bay, 380), 1319.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Whiteford v. Hitchcock (74 Mich. 208), 228, 234.
Whitehead v. Anderson (9 M. & W. 518), 1537, 1556, 1557, 1577, 1578, 1591, 1598, 1601, 1608, 1609.
Whitehouse v. Frost (12 East, 614), 708, 711, 759.
Whitesides v. Hunt (97 Ind. 191), 203, 1031, 1032, 1035, 1036, 1039.
Whitfield v. United States (92 U. S. 165), 1024.
Whiting v. Farrand (1 Conn. 60), 739, 1181.
Whiting v. Hill (23 Mich. 399), 879.
Whiting v. Insurance Co. (15 Md. 297), 1466.
Whiting v. Price (170 Mass. 240), 1841.
Whiting v. Sullivan (7 Mass. 107), 1475.
Whiting Mfg. Co. v. Gephart (6 Wash. 615), 964.
Whitla v. Moore (164 Pa. St. 451), 1158.
Whitlock v. Heard (3 Rich. 88), 912.
Whitman Agricultural Ass'n v. National Ass'n (45 Mo. App. 90), 1407.
Whitman Agricultural Co. v. Hornbrook (55 N. E. R. 502), 49.
Whitmarsh v. Hall (3 Denio, 375), 109.
Whitmarsh v. Walker (1 Metc. 313), 339, 1407.
Whitmore v. Gibbs (24 N. H. 484), 331.
Whitmore v. Iron Co. (2 Allen, 52), 1254, 1259, 1340.
Whitmore v. South Boston Iron Co. (2 Allen, 52), 1314.
Whitney v. Allaire (1 N. Y. 305), 910, 1843.
Whitney v. Boardman (118 Mass. 242), 933, 1339, 1640, 1643, 1690.
Whitney v. Dutch (14 Mass. 457), 121.
Whitney v. Eaton (15 Gray, 225), 546, 549, 556.
Whitney v. Heywood (6 Cush. 82), 1302.
Whitney v. McConnell (29 Mich. 12), 588, 605.
Whitney v. Price (172 Mass. 240), 1843.
Whitney v. State Bank (7 Wis. 620), 1455.
Whitney v. Sutton (10 Wend. 411), 1242, 1268.
Whitney v. Taylor (54 Barb. 536), 1270.
Whittaker, Ex parte (L. R. 10 Ch. App. 446), 906.
Whitten v. Fitzwater (129 N. Y. 626), 902.
Whittier v. Dana (10 Allen, 326), 806.
Whittington v. Ross (8 Ill. App. 234), 1456.
Whitwell v. Vincent (4 Pick. 449), 554, 555, 1437.
Whitworth v. Thomas (83 Ala. 308), 932, 935.
Wickes v. Hill (115 Mich. 323), 569, 646.
Wickham v. Martin (13 Gratt. 427), 924.
Widoe v. Webb (20 Ohio St. 431), 1004.
Wiedeman v. Keller (171 Ill. 93), 1356.
Wieler v. Schilizzi (17 C. B. 619), 1333.
Wiener v. Whipple (53 Wis. 298), 430, 446, 447, 448, 455, 1327.
Wigand v. Sichel (3 Keyes, 120), 912, 1411.
Wiggin v. Day (9 Gray, 97), 924.
Wiggins v. Snow (89 Mich. 476), 595, 605, 613, 636, 642.
Wigglesworth v. Steers (1 H. & M. 70), 86.
Wigton v. Bowley (130 Mass. 252), 502, 740, 757, 787.
Wilbur v. Nichols (61 Vt. 432), 950.
Wilbur Lbr. Co. v. Overbeck Co. (96 Wis. 383), 1844.
Wilcox v. Cherry (123 N. C. 79), 569.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Wilcox v. Cline (70 Mich. 517), 248.
Wilcox v. Hall (53 Ga. 635), 1340, 1344.
Wilcox v. Iowa Wesleyan University (32 Iowa, 367), 863.
Wilcox v. Jackson (7 Colo. 521), 144, 964.
Wilcox v. Owen (64 Ga. 601), 1260, 1340.
Wilcox v. Roath (12 Conn. 550), 121.
Wilcox v. San Jose Fruit Packing Co. (113 Ala. 519), 915.
Wilcox v. Williamson Co. (92 Iowa, 215), 603.
Wilcox v. Young (66 Mich. 687), 212.
Wilcox Silver Plate Co. v. Green (72 N. Y. 17), 363, 391, 393, 736, 1181.
Wilder v. Beede (119 Cal. 646), 942.
Wilder v. De Cou (18 Minn. 471), 875.
Wilder v. Weakley (34 Ind. 184), 74.
Wiles v. Woodward (5 Exch. 557), 834.
Wiley v. Athol (170 Mass. 426), 1075.
Wiley v. Howard (15 Ind. 169), 1794.
Wiley v. Lashlee (8 Humph. 716), 960.
Wiley v. Mahood (10 W. Va. 206), 1455.
Wiley v. Smith (2 Can. Sup. Ct. R. 1), 1587.
Wiley v. Smith (1 Ont. App. 179), 1587.
Wiley v. Wilson (77 Ind. 596), 79.
Wilkes v. Ferris (5 Johns. 335), 380.
Wilkin Mfg. Co. v. Loud Lumber Co. (94 Mich. 158), 228.
Wilkins v. Stevens (8 Vt. 214), 1441.
Wilkinson, Ex parte (Ambler, 399), 1526.
Wilkinson, Adm'r, v. Wilkinson (61 Vt. 409), 364.
Wilkinson v. Blount Mfg. Co. (169 Mass. 374), 1073, 1080.
Wilkinson v. Evans (L. R. 1 C. P. 407), 428.
Wilkinson v. Ferre (24 Pa. St. 190), 838, 1793, 1849.
Wilkinson v. Heavenrich (58 Mich. 574), 1449.
Wilkinson v. Holiday (33 Mich. 386), 499, 516.
Wilkinson v. Holloway (7 Leigh, 277), 1455.
Wilkinson v. Ketler (69 Ala. 435), 202.
Wilkinson v. Stewart (85 Pa. St. 255), 1158.
Wilkinson v. Taylor Mfg. Co. (67 Miss. 281), 426, 428.
Wilkinson v. Williamson (76 Ala. 163), 206.
Wilks v. Davis (3 Meriv. 507), 674.
Willamette Steam Mills Co. v. Union Lbr. Co. (94 Cal. 156), 1374.
Willan v. Carter (Oliphant, 74), 1270.
Willard v. Ostrander (46 Kan. 591), 1254.
Willard v. Tatum (97 Cal. xviii), 1374.
Willcox v. Jackson (51 Iowa, 208), 68.
Williams v. Allen (10 Humph. 337), 634.
Williams v. Briggs (11 R. I. 476), 202.
Williams v. Brown (34 Me. 594), 95.
Williams v. Burgess (10 Ad. & E. 499), 328.
Williams v. Byrnes (1 Moore, P. C., N. S., 154), 434.
Williams v. Carr (80 N. C. 294), 1032, 1043.
Williams v. Clink (90 Mich. 297), 947.
Williams v. Crosby Lumber Co. (118 N. C. 928), 1618, 1703.
Williams v. Dakin (22 Wend. 201), 1073.
Williams v. Dillon (100 Ga. 656), 1718.
Williams v. Feiniman (14 Kan. 288), 702.
Williams v. Gray (39 Mo. 201), 491, 527.
Williams v. Hart (116 Mass. 513), 1131.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Williams v. Hodges (113 N. C. 36), 1582.
Williams v. Ingram (21 Tex. 300), 1272.
Williams v. Jackman (16 Gray, 514), 755.
Williams v. Johnston (92 N. C. 532), 1455.
Williams v. Lake (2 E. & E. 349), 434.
Williams v. Lane (87 Wis. 152), 1057, 1058.
Williams v. Montgomery (148 N. Y. 519), 1718, 1724, 1727.
Williams v. Moor (11 M. & W. 256), 124.
Williams v. Moore (5 N. H. 235), 1499.
Williams v. McFadden (23 Fla. 143), 874, 1843.
Williams v. Paul (6 Bingham, 653), 1057.
Williams v. Robb (104 Mich. 242), 1391, 1392.
Williams v. Robinson (73 Me. 186), 446, 447, 448, 449.
Williams v. Reynolds (6 Best & S. 495), 1762, 1770.
Williams v. Slaughter (3 Wis. 347), 1356.
Williams v. Spafford (8 Pick. 250), 1320.
Williams v. Tappan (23 N. H. 385), 1047.
Williams v. Thrall (101 Wis. 337), 1811, 1826.
Williams v. Tiedeman (6 Mo. App. 269), 1034.
Williams v. Tobacco Co. (44 S. W. R. 185), 49.
Williams v. Walker (2 Sandf. Ch. 325), 1453.
Williams v. Wentworth (5 Beav. 325), 84.
Williams v. Woods (16 Md. 220), 457, 463, 1748.
Williams Mfg. Co. v. Standard Brass Co. (173 Mass. 356), 1384.
Williamson v. Allison (2 East, 446), 932, 1311, 1810.
Williamson v. Berry (8 How. 495), 5, 9, 20, 205, 234.
Williamson v. Brandenburg (6 Ind. App. 97), 1057.
Williamson v. Canaday (3 Ired. 349), 1281.
Williamson v. Russell (39 Conn. 406), 923.
Williamson v. Sammons (34 Ala. 691), 1302.
Williamson v. Wachenheim (58 Iowa, 277), 953.
Williar v. Irwin (11 Biss. 57), 1032.
Willis v. Morris (63 Tex. 458), 947.
Willis v. McIntyre (70 Tex. 34), 955.
Willis v. Twambly (13 Mass. 204), 1017.
Willis v. Willis' Adm'r (6 Dana, 48), 483, 492.
Willman Co. v. Fussy (15 Mont. 511), 774, 779.
Willock v. Crescent Oil Co. (184 Pa. St. 245), 1746.
Wills v. Ross (77 Ind. 1), 428.
Wilman v. Mizer (60 Ark. 281), 1840, 1841.
Wilmarth v. Mountford (4 Wash. 79), 1437.
Wilmot v. Hurd (11 Wend. 584), 1235, 1248.
Wilmot v. Lyon (49 Ohio St. 296), 906.
Wilmouth v. Patton (2 Bibb, 280), 734, 1124.
Wilmshurst v. Bowker (7 Man. & Gr. 882), 775, 787, 1541, 1543.
Wilson v. Bauman (80 Ill. 494), 1147.
Wilson v. Branch (77 Va. 65), 95.
Wilson v. Carson (12 Md. 54), 649.
Wilson v. Cattle Co. (36 U. S. App. 634), 1839.
Wilson v. Crochet (43 Mo. 216), 154.
Wilson v. Deen (74 N. Y. 531), 1254.
Wilson v. Express Co. (27 Mo. App. 360), 887.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Wilson v. Ford (L. R. 3 Ex. 63), 185.
Wilson v. Foree (6 Johns. 110), 913, 1411.
Wilson v. Fruit Co. (11 Ind. App. 89), 747.
Wilson v. Fuller (58 Minn. 149), 336.
Wilson v. Hanson (20 N. H. 375), 1428.
Wilson v. Hill (17 Nev. 401), 964.
Wilson v. Leslie (20 Ohio, 161), 963.
Wilson v. Lewiston Mill Co. (150 N. Y. 314), 428, 445, 452.
Wilson v. Milligan (75 Mo. 41), 1057.
Wilson v. Stratton (47 Me. 120), 660, 1449.
Wilson v. Voight (6 Colo. 614), 649.
Wilson v. Wilson (181 Pa. St. 80), 175.
Wilson v. Y. & Md. Line R. Co. (11 G. & J. 58), 673.
Winchell v. Carey (115 Mass. 560), 1058.
Winchell v. Scott (114 N. Y. 640), 1147.
Winchester v. Charter (12 Allen, 606), 973.
Winchester v. Howard (97 Mass. 303), 267, 268.
Winchester v. Newton (2 Allen, 492), 1145, 1148.
Winchester Mfg. Co. v. Carman (109 Ind. 31), 601.
Wind v. Iler (93 Iowa, 316), 676, 678, 1028.
Windmuller v. Pope (107 N. Y. 674), 1089, 1090, 1092, 1708.
Windram v. French (151 Mass. 547), 882.
Windsor v. Cruise (79 Ga. 635), 683.
Wineland v. Coonce (5 Mo. 296), 923.
Wineman v. Walters (53 Mich. 470), 1663.
Winfield v. Dodge (45 Mich. 355), 1053, 1057.
Wing v. Clark (24 Me. 366), 736, 483, 492.
Wing v. Milliken (91 Me. 387), 1786.
Wing v. Thompson (78 Wis. 256), 612, 624, 638.
Wing v. Wadhams Oil Co. (99 Wis. 248), 211.
Wingate v. Buhler (62 Mo. App. 418), 892.
Winkelmeyer Brewing Ass'n v. Nipp (6 Kan. App. 730). 1027, 1029.
Winkley v. Hill (9 N. H. 31), 956.
Winn v. Morris (94 Ga. 452), 1850.
Winner v. Williams (62 Mich. 363), 396.
Winship v. Bank of United States (5 Peters, 529), 143.
Winside State Bank v. Lound (52 Neb. 469), 1741.
Winslow v. Harriman Iron Co. (42 S. W. R. 698), 1634.
Winslow v. Leonard (24 Pa. St. 14), 987.
Winslow v. Norton (29 Me. 419), 166.
Winslow v. Railroad Co. (42 Vt. 700), 887.
Winsor v. Lombard (18 Pick. 60), 1335, 1337, 1357.
Winsted Bank v. Webb (39 N. Y. 325), 1429.
Winterbottom v. Wright (10 M. & W. 109), 878.
Wintz v. Morrison (17 Tex. 372), 869, 935.
Wirebach v. First Nat. Bank (97 Pa. St. 543), 76, 79.
Wirth v. Roche (92 Me. 383), 1004.
Wisconsin Red Pressed Brick Co. v. Hood (60 Minn. 401), 1337, 1350.
Wise v. Collins (121 Cal. 147), 567.
Wisecarver v. Adamson (118 Pa. St. 53), 1128.
Wiseman v. Vanderput (2 Vern. 203), 1526.
Witherow v. Witherow (16 Ohio, 238), 1162.
Wittkowsky v. Wasson (71 N. C. 451), 205, 209.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Wolcott v. Heath (78 Ill. 433), 1034.
Wolcott v. Mount (36 N. J. L. 262), 1209, 1334, 1354, 1827.
Wolcott v. Mount (38 N. J. L. 496), 1827.
Wolf v. Dietzsch (75 Ill. 205), 746.
Wolf v. Kahn (62 Miss. 814), 964.
Wolf v. Lachman (20 S. W. R. 867), 892, 924.
Wolf v. Marsh (54 Cal. 228), 1097.
Wolf v. McGugin (37 W. Va. 552), 955.
Wolf v. National Bank (178 Ill. 85), 203, 1037.
Wolf v. Willetts (35 Ill. 88), 264.
Wolford v. Young (105 Iowa, 512), 1453.
Wollensak v. Briggs (119 Ill. 453), 755.
Wollner v. Lehman (85 Ala. 274), 903, 904.
Wood v. Ashe (3 Strob. 64), 1260.
Wood v. Bell (5 El. & Bl. 772), 755.
Wood v. Bell (6 E. & B. 355), 355, 761, 762.
Wood v. Boynton (64 Wis. 265), 276.
Wood v. Cavin (38 Tenn. 506), 1795.
Wood v. Chambers (20 Tex. 247), 952.
Wood v. Evans (98 Ga. 454), 603.
Wood v. Garland (58 N. H. 154), 915.
Wood v. Jackson (8 Wend. 9), 955.
Wood v. Losey (50 Mich. 475), 131, 132.
Wood v. Manley (11 Ad. & El. 34), 1191.
Wood v. Michaud (63 Minn. 478), 765, 1321, 1674.
Wood v. Roeder (50 Neb. 476), 872.
Wood v. Ross (— Tex. Civ. App. —), 1314, 1355.
Wood v. Sheldon (42 N. J. L. 421), 835, 838, 1303, 1849.
Wood v. Smith (5 M. & Ry. 124), 1241, 1242, 1277.
Wood v. Tastell (6 Ad. & El., N. S., 234), 491, 1187, 1412.
Wood v. Yeatman (15 B. Mon. 270), 1571.
Wood Harvester Co. v. Ramberg (60 Minn. 219), 1321.
Wood Mach. Co. v. Calvert (89 Wis. 640), 1380, 1385.
Wood Mower & Reaper Co. v. Thayer (50 Hun, 516), 1344.
Wood Mowing & Reap. Mach. Co. v. Crow (70 Iowa, 340), 1288.
Wood Mowing & Reap. Mach. Co. v. Gaertner (55 Mich. 453), 1255.
Wood Reaping, etc. Mach. Co. v. Smith (50 Mich. 565), 667, 669.
Woodall v. Kelly (85 Ala. 368), 955.
Woodbury v. Larned (5 Minn. 339), 1455.
Woodbury v. Long (8 Pick. 543), 1189.
Woodbury v. Robbins (10 Cush. 520), 1270, 1271.
Woodford v. Hamilton (139 Ind. 481), 1026.
Woodford v. McClenahan (4 Gilm. 85), 1281.
Woodford v. Patterson (32 Barb. 630), 328.
Woodle v. Whitney (23 Wis. 55), 1155, 1208, 1344.
Woodley v. Coventry (2 H. & C. 164), 1493, 1503.
Woodruff v. Nashville, etc. R. Co. (2 Head, 87), 752.
Woodruff v. Noyes (15 Conn. 335), 746, 1572.
Woodruff v. Railroad Co. (2 Head, 87), 51.
Woodruff v. Scaife (83 Ala. 152), 143.
Wood's Appeal (92 Pa. St. 379), 162.
Woods v. Armstrong (54 Ala. 150), 1045, 1046, 1048, 1050.
Woods v. Ayers (39 Mich. 345), 17, 1411.
Woods v. Cramer (34 S. C. 508), 1643.
Woods v. Magee (7 Ohio, 128), 542, 701, 714.
Woods v. Miller (55 Iowa, 168), 1129, 1134.
Woods v. Nichols (21 R. I. 537), 156.
Woods v. Russell (5 B. & Ald. 942), 510, 755, 759, 761, 762.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1850.

Woodward v. Barnes (43 Vt. 330), 183.
Woodward v. Boone (126 Ind. 122), 29.
Woodward v. Brooks (128 Ill. 212), 1043.
Woodward v. Emmons (61 N. J. L. 281), 1387.
Woodward v. Seamans (125 Ind. 350), 22, 25.
Woodward v. Thacher (21 Vt. 580), 1843.
Woolenslagle v. Runals (76 Mich. 545), 1843.
Wooley v. Wagon Co. (59 N. J. L. 278), 603, 649.
Wolfe v. Horne (2 Q. B. Div. 355), 1138.
Woolman v. Wirtsbaugh (22 Neb. 490), 1843.
Woolner v. Hill (93 N. Y. 576), 1097.
Woolridge v. Gage (68 Ill. 157), 970.
Woonsocket Rubber Co. v. Lowenberg (17 Wash. 29), 908, 909, 924.
Worcester v. Eaton (11 Mass. 368), 1053.
Worden v. Harvester Co. (11 Neb. 116), 1384.
Work v. Bennett (70 Pa. St. 484), 1787.
Work v. Jacobs (35 Neb. 772), 892, 924.
Worland v. Kimberlin (6 B. Mon. 608), 952.
Wornock v. Loar (11 S. W. R. 438), 132.
Worrall v. Munn (5 N. Y. 229), 425.
Worth v. McConnell (42 Mich. 473), 1245.
Worthington v. Bullitt (6 Md. 172), 957.
Worthy v. Johnson (8 Ga. 236), 1307.
Wray v. Chandler (64 Ind. 146), 72, 73.
Wright v. Bank of Metropolis (110 N. Y. 237), 1132, 1787.
Wright v. Barnard (89 Iowa, 166), 599, 603, 679.
Wright v. Bell (5 Price, 325), 1730.
Wright v. Brown (67 N. Y. 1), 906.
Wright v. Cabot (89 N. Y. 570), 1447, 1452.
Wright v. Casteel, State ex rel. (51 Mo. App. 143), 964.
Wright v. Daily (26 Tex. 730), 1455.
Wright v. Dannah (2 Camp. 203), 462.
Wright v. Fisher (65 Mich. 279), 86.
Wright v. Hart (18 Wend. 449), 1311, 1357.
Wright v. Hughes (119 Ind. 324), 1013.
Wright v. Lowes (4 Esp. 82), 1597.
Wright v. McCormick (67 Mo. 426), 964.
Wright v. O'Brien (5 Daly, 54), 755, 759.
Wright v. Ryder (26 Cal. 342), 208.
Wright v. Shelby R. Co. (16 B. Mon. 4), 874.
Wright v. Tetlow (99 Mass. 397), 755.
Wright v. Vaughn (45 Vt. 369), 565.
Wright v. Weeks (25 N. Y. 153), 426.
Wright v. Wright (51 N. J. Eq. 475), 892.
Wrigley v. Cornelius (162 Ill. 92), 1633, 1635, 1643.
Wulschner v. Ward (115 Ind. 219), 328.
Wyckoff v. Vicary (75 Hun, 409), 149.
Wyler v. Rothschild (53 Neb. 566), 361, 1387.
Wyman v. Brown (50 Me. 139), 973.
Wyman v. Rae (11 G. & J. 416), 1423, 1427.
Wynn v. Longley (31 Ill. App. 616), 1843.
Xenos v. Wickham (L. R. 2 H. L. 296), 259.
Yale v. Seely (15 Vt. 221), 1191.
Yanger v. Skinner (1 McCarter, 389), 69.
Yates v. Lyon (61 N. Y. 344), 97.
Yates v. Pym (6 Taunt. 446), 1236, 1264.
Yeakle v. Jacob (33 Pa. St. 376), 336.
Yellow Poplar Lumber Co. v. Chapman (20 C. C. A. 687), 1690.
Yerkes v. Norris (90 Mich. 234), 1426.
Yoder v. Haworth (57 Neb. 150), 49.

References are to sections: Vol. I, §§ 1-797; Vol. II, §§ 798-1650.

York County Bank v. Carter (38 Pa. St. 446), 955.
Young v. Austin (6 Pick. 280), 714.
Young v. Blaisdell (60 Me. 272), 355, 358.
Young v. Burton (1 McMul. Eq. 255), 1719.
Young v. Cureton (87 Ala. 727), 1763.
Young v. Dalton (83 Tex. 497), 1664.
Young v. Kansas Mfg. Co. (23 Fla. 394), 546, 549.
Young v. Lathrop (67 N. C. 63), 977.
Young v. Mertens (27 Md. 114), 1643, 1682.
Young v. Miles (20 Wis. 615), 702, 711.
Young v. Miles (23 Wis. 643), 708.
Young v. McClure (2 Watts & S. 147), 960.
Young v. Stevens (48 N. H. 133), 74, 84, 109.
Young Mfg. Co. v. Wakefield (121 Mass. 91), 831, 1401, 1846.
Youngblood v. Birmingham Trust Co. (95 Ala. 521), 1045.
Yount v. Yount (144 Ind. 133), 65.
Youse v. Norcoms (12 Mo. 549), 95.
Yundt v. Roberts (5 Serg. & R. 139), 1004.
Zabriskie v. Central, etc. R. Co. (131 N. Y. 72), 1335, 1393, 1395.
Zaleski v. Clark (44 Conn. 218), 665, 666.
Zann v. Haller (71 Ind. 136), 451.
Zellner v. Mobley (84 Ga. 746), 1194.
Ziegler v. Handrick (106 Pa. St. 87), 935.
Zimmerman v. Morrow (28 Minn. 367), 859, 1225, 1247.
Zimmerman v. Sale (3 Rich. 76), 451.
Zimmerman Mfg. Co. v. Dolph (104 Mich. 281), 1254.
Zoeller v. Riley (100 N. Y. 103), 151.
Zook v. Odle (3 Colo. App. 87), 1423.
Zuchtmann v. Roberts (109 Mass. 53), 599.
Zuck v. McClure (98 Pa. St. 541), 1089, 1090, 1092, 1129, 1707.
Zucker v. Karpeles (88 Mich. 413), 901, 906.

SALE OF PERSONAL PROPERTY.

SALE OF PERSONAL PROPERTY.

BOOK I.

OF THE CONTRACT OF SALE: ITS FORMATION.

CHAPTER I.

DEFINITIONS.

§ 1. Sale defined.
2. —— Forms of bargaining.
3. —— Effect of intention.
4. —— Essential elements.
5. Further of the definition — Executory or executed sales.
§ 6. —— Bargain and sale.
7. Absolute and conditional sales.
8. Voluntary and forced sales.
9. Judicial sales.
10. Public and private sales.

§ 1. Sale defined.— A sale of personal property is the transfer, in pursuance of a valid agreement, from one party, called the *seller*, to another, called the *buyer*, of the general or absolute title to a specific chattel, for a price, or a consideration estimated, in money.[1]

[1] Mr. Benjamin, Sales, § 1, says: "It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*."

Blackstone defines it as "a transmutation of property from one man to another in consideration of some price." 2 Bl. Com. 446. Kent defines it as "a contract for the transfer of property from one person to another for a valuable consideration." 2 Kent's Com. 468.

Long's definition is "a transferring of property from one person to another, in consideration of a sum of money to be paid by the vendee to the vendor." Long on Sales, 1.

Story (W. W.) says: "A sale is a transfer of the absolute title to property for a certain agreed price." Story on Sales, § 1.

Tiedeman defines it as "a contract or agreement for the transfer of the absolute property in personalty from one person to another for a price in money." Tiedeman on Sales, § 1.

English Sale of Goods Act, 1893: "1.—(1) A contract of sale of goods

The essential elements here involved are that there must be (1) a transfer, of (2) the general or absolute title, to (3) a specific chattel, for (4) a price in money or a consideration estimated in money.

Sale is pre-eminently the transfer of the title. This transfer may ensue at once as the immediate effect of the present agreement of the parties; or it may be the postponed result to ensue in future from the present agreement of the parties aided or completed by some subsequent act or event, such as the lapse of time or the performance of precedent conditions. In either case the sale takes place only when the title passes.

Sale means, moreover, the transfer of the absolute or general title. There may be other transfers, of limited interests, such as the right of possession or some special property in or lien upon the goods; but these, as will be seen,[1] do not constitute a sale.

There can clearly be no present sale until the specific chattel has been ascertained and identified. There may be bargainings concerning the future sale of a chattel not yet in existence, or not yet ascertained; but these bargainings, as will also be seen,[2] cannot ripen into sale until in some way the particular chattel has been ascertained.

There may be transfers of title for some other consideration than a price in money; but no transfer, as will further be seen,[3] is entitled to be denominated a sale unless it be for a price in money, or at least a consideration estimated in money.

is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another. (2) A contract of sale may be absolute or conditional. (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

[1] See *post*, ch. II.

[2] See *post*, Book II, ch. IV.

[3] See *post*, ch. V.

§ 2. —— **Forms of bargaining.**— The bargainings of parties respecting a transfer of title may take a variety of forms. Thus, (1) there may be an agreement whose legal effect is the immediate transfer of the absolute or general title. This is a *sale*, called sometimes, for the purpose of further distinction, a present sale, an executed sale, or a bargain and sale. Or (2) there may be an agreement whose legal effect is that the title shall not pass until a future time, either because, in the case of an ascertained chattel, something remains to happen or be performed which the parties have treated as precedent, or because the particular chattel whose title is to be so transferred has not yet been ascertained. This is an *agreement to sell*, called often, for purposes of further distinction, an executory sale. It does not become a sale until the precedent event has happened or the condition has been performed. It then becomes a sale by force of the present agreement aided or completed by the happening of that event or the performance of that condition. Or (3) there may be still another form of agreement, namely, the parties may now agree that at some future time stated they will come together and enter into another specified agreement either for a then present sale or for a then future sale. In this case it is not the intention of the parties that the title shall now or then pass as the legal result of the agreement now made, but only that they will then enter into another specified contract which shall operate to pass the title either then or at some other time agreed upon. In other words, adopting the distinction adverted to above, there may be either (1) a present sale, or (2) a present agreement for a future sale, or (3) a present agreement for a certain future agreement to sell.

In all of the forms of bargaining here referred to, however, it is clear that one result is aimed at, namely, the transfer of the title, or a sale.

§ 3. —— **Effect of intention.**— Whether in any given case the bargainings of the parties shall amount to a present sale, or only to an agreement to sell, depends often and largely

upon the intention of the parties. There are, however, certain conditions or circumstances which conclusively determine their intention, while others raise a *prima facie* presumption concerning it. Thus, where the contract has reference to a chattel not then designated, it cannot, in the very nature of the case, fall within the category of present sales, and no title will pass until the chattel has been ascertained.[1] But where the contract has reference to a chattel then existing, designated and ready for delivery, a presumption arises that a present sale was contemplated and the title will therefore be presumed to pass at once.[2] This presumption, however, is not conclusive, and it may be shown that the parties intended that the title should not pass until some future time or the performance of some future act, and their intention will be given effect.

§ 4. —— **Essential elements.**— The essence of the bargainings concerning sale is, therefore, the agreement or assent of the parties to the present or future transfer of the title to a chattel either now designated or afterwards to be ascertained. Unlike the case of real estate, no deed, conveyance or other formality is, in general, necessary to give effect to the intention of the parties; when the conditions are ripe for the transfer, the law itself executes their intention by deeming the transfer as made in conformity to their assent. This assent, moreover, need not be express, but may be inferred from the acts and conduct of the parties.

Another element, often appearing in conjunction with this element of assent, is that of the surrender of the possession of the chattel by the seller and the assumption of that possession by the buyer — constituting what is commonly spoken of as the *delivery* of the chattel. This element, though very common, and apparently often regarded as essential, is by no means indispensable; for there may clearly be a completed sale of the property, though the seller retains the possession; and there may also be a complete change of possession without any corresponding change of title.

[1] See *post*, Book II, ch. II.

[2] See *post*, Book II, ch. IV.

A third element, also, often appearing with the others, is that of *payment*. But payment is by no means a necessary concomitant of the transfer of the title; for the property may be paid for before the title passes, or contemporaneously with its transfer, or at any time thereafter.

§ 5. Further of the definition — Executory or executed sales.— The word *sale*, remarked the supreme court of the United States in a leading case,[1] "is a word of precise legal import, both at law and in equity." Unfortunately, however, this precision of meaning is a condition rather to be desired than as yet actually attained, for it seems impossible for courts and text-writers to agree either as to the meaning of the word or as to the essential elements of the idea it represents. According to some, the sale is the *transfer* of the title; according to others, it is the *agreement* to transfer.[2] In the case of the agreement for a present transfer, where the law executes the agreement by deeming the title as transferred accordingly, it can be matter of small moment whether the word be applied to the agreement or to the transfer, because the making of the former operates at once to effectuate the latter; but where time, or the performance of conditions, is to intervene between the agreement and the transfer, it is necessary to have appropriate words to indicate these two ideas.

It is, indeed, true here that the effectual thing upon which the law operates to produce the transfer is still the agreement of the parties; but before the law so operates, the agreement of the parties requires to be aided, supplemented or completed by the lapse of time or the performance of conditions precedent, and during this interval the attitude or relation of the parties needs often to be definitely determined.

That the difference in legal effect between a mere agreement to transfer title hereafter and a present transfer of it, is radical

[1] Williamson v. Berry (1850), 8 How. (49 U. S.) 495, 544. "It means at all times," continued the court, "a contract between parties to give and to pass rights of property for money — which the buyer pays or promises to pay to the seller for the thing bought and sold."

[2] Compare the definitions collected in the note to the preceding section.

requires no argument to establish. "By an agreement to sell," it has been said, "a *jus in personam* is created; by a sale a *jus in rem* is transferred. If an agreement to sell be broken the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken on execution for his debts, and if he becomes bankrupt they pass to his trustee. . . . But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as the action for conversion and detinue. In most cases, too, he can follow the goods into the hands of third parties. Again, if there be an agreement for sale and the goods perish, the loss falls on the seller; while, if there has been a sale, the loss, as a rule, falls on the buyer, though the goods have not come into his possession."[1]

§ 6. —— **Bargain and sale.**— The common law clearly recognized these two forms and applied to each a well-known name. Thus, "if, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law 'a bargain and sale of goods;' but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, then the contract was called in the common law 'an executory agreement.'"[2]

The attempt to distinguish these forms has frequently been made by applying the term "executed sale" to the former and "executory sale" to the latter; but this attempt has not proved entirely satisfactory, not only because the terms have not always been used in the same sense, but because even the so-called "executed sale" may be executed in part only; that is, so far as to pass the title, while it remains executory in part, as where delivery or payment is postponed.

[1] Chalmers on Sale, 3.

[2] Benjamin on Sales (6th Am. ed.), § 4.

The English Sale of Goods Act of 1893 distinguishes thus: "Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."[1] This phraseology is probably as satisfactory as any, and is substantially that herein adopted.

Assuming the general meaning of the term to be thus agreed upon, it may be convenient, before going further, to consider briefly certain special forms or classifications of sale, and to determine whether they lie within or without the scope of the present treatise. Thus —

§ 7. Absolute and conditional sales.— A variety of classifications may be made, based upon the absolute or conditional character of the contract of sale. Thus, in accordance with one basis of distinction — which is really that at the foundation of the distinctions made in the preceding sections between a sale and a contract to sell, between executed and executory sales — a sale is said to be absolute "which has been completed or perfected; a sale outright;" while a conditional sale is one which "takes effect or is to become complete on the performance of a condition."[2] But this so-called absolute sale may be subject to a condition subsequent, as where there is a "completed or perfected" change of title, *i. e.*, "a sale outright," subject to be defeated by the non-performance of some annexed condition. There may clearly, also, be an absolute contract to sell, as well as a conditional contract to sell.

There is also a form of contract, more fully to be discussed

[1] Sec. 1, par. 3 and 4. "The fundamental difference between a sale, properly so called, and an agreement to sell is that in the former case the title passes, while in the latter case it does not." Blackwood v. Cutting Packing Co. (1888), 76 Cal. 212, 18 Pac. R. 248, 9 Am. St. R. 199.

[2] Anderson's Law Dictionary, 915.

hereafter,[1] popularly known as a "conditional sale," which is really a contract to sell upon the performance of certain conditions by the purchaser, the most usual of the conditions being the payment of the price.

§ 8. **Voluntary and forced sales.**— Sales are also often further classified as voluntary or forced. A voluntary sale, as its name implies, is one which is voluntarily made, as when it is made by or under the authority of the owner of the goods. A forced or involuntary sale is one made, not of the volition of the owner, but by the authority and in pursuance of the law.[2] Of this kind are the great variety of sales made by public officers, such as sheriffs', guardians' and executors' sales, as well as the judicial sales which will be hereafter defined.

A sale, though made by a public officer, is not a forced sale when it finds its authority in the consent of the owner, as where a sale is made under a power of sale expressly created by a mortgage;[3] or where the owner consents to the sale of that which could not lawfully be sold without his consent, as when he consents to the sale of exempt property upon an execution.[4]

§ 9. **Judicial sales.**— Closely allied to the distinctions of the last section is the subject-matter of this one. A judicial sale is one made by virtue and in pursuance of an order or decree of a court of competent jurisdiction, and by its duly authorized officer.[5]

[1] See *post*, Book II, ch. III.

[2] In Sampson v. Williamson (1851), 6 Tex. 102, 55 Am. Dec. 762, it is said: "A forced sale has been defined to be a sale made at the time and in the manner prescribed by law, in virtue of an execution issued on a judgment already rendered by a court of competent jurisdiction: Dufour v. Camfranc, 11 Mart. (La.) 610, 13 Am. Dec. 360; Donaldson v. Rouzan, 8 Mart. N. S. 163; Macdonough v. Elam, 1 La. 491, 20 Am. Dec. 284; or, in other words, a forced sale is one which is made under the process of the court and in the mode prescribed by law. Civ. Code La., arts. 2580, 2594, 2595."

[3] Patterson v. Taylor (1875), 15 Fla. 340. *Cf.* Sampson v. Williamson, *supra*.

[4] Peterson v. Hornblower (1867), 33 Cal. 276.

[5] Lawson v. De Bolt (1881), 78 Ind. 564; Terry v. Cole (1885), 80 Va. 701; Williamson v. Berry (1850), 8 How. (U. S.) 507; Moore v. Shultz (1850), 13 Pa. St. 98, 53 Am. Dec. 446.

The law governing judicial sales constitutes a separate title of the law, and most of it lies outside the scope of this treatise, although some aspects of it will be considered hereafter.

§ **10. Public and private sales.**— A public sale is one made at auction to the highest bidder. A private sale is one not made by public auction but by private negotiation. Private sales are always voluntary, but forced sales are always public. A voluntary sale may also be public at the pleasure of the owner.

CHAPTER II.

TRANSACTIONS TO BE DISTINGUISHED FROM SALES.

§ 11. Purpose of this chapter.
12. Sale to be distinguished from gift.
13–15. Sale to be distinguished from barter or exchange.
16–18. —— Uses of this distinction — Pleading — Statutes — Waiving tort — Construction of authority.
19–20. Sale to be distinguished from bailment.
21–22. —— Change of form or substance as the test — Illustrations.
23. —— Further illustrations.
24. —— Intention of parties as the test.
25–26. Same subject — Commingling of goods — Effect of custom.
27–30. Commingling with right of sale or use in bailee.
31. Bailment with privilege of purchase to be distinguished from sale.
32. —— Option to buy and pay for chattel or pay for its use.
33. Delivery of goods on trial to be purchased if approved.
34. Sale with option to return or pay.
35. Bailment or sale, how determined — Law or fact.
36. Sale to be distinguished from mortgage.
37. Sale to be distinguished from pledge.
§ 38. —— Sale, not pledge.
39. Pledge, not sale.
40. Parol evidence to show apparent sale to be pledge or mortgage.
41–42. Sale to be distinguished from mere agency to buy.
43–45. Sale to be distinguished from agency to sell or "consignment."
46. —— Principles of construction.
47. Illustrations of construction.
48. —— Agency, not sale.
49. —— Sale, not agency.
50. —— How question determined — Law or fact.
51. Consignment of goods to pay debt or cover prior advances.
52. Sale to be distinguished from contract for work and labor.
53. Sale to be distinguished from compromise respecting liens.
54. Furnishing of food by restaurant or innkeeper as sale.
55. Supplying goods by several common owners to one of them — Social clubs — Intoxicating liquors.
56. Transfer of title by operation of law.

§ 11. Purpose of this chapter.— To be distinguished from sales are many transactions bearing more or less resemblance to sales, or partaking partly of the nature of sales and partly of some other character, but which are not sales in fact. Before going further, therefore, it seems to be desirable to give some attention to additional distinctions and differences, and this chapter will be devoted to that object.

§ 12. Sale to be distinguished from gift.— With this end in view, it may first be noticed that a sale is to be distinguished from a gift. A sale, as has been seen, is a transfer of title in consideration of a price, while a gift has been defined as a voluntary transfer of his property by one person to another without any consideration or compensation therefor. To make it valid as a gift, the transfer must be executed, for the reason that, there being no consideration for it, no action will lie to enforce it. To consummate a gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter, with intent to vest the title in him.[1]

§ 13. Sale to be distinguished from barter or exchange. So sale is to be distinguished from barter or exchange, though the transactions are, in many respects, very much alike. As has been seen,[2] sale is the transfer in consideration of a price in money or its equivalent. Barter, on the other hand, is the exchange of one article for another, no price in money being fixed upon either.[3] If, therefore, as is said in one case,[4] "property is taken at a fixed money price, the transfer amounts to a sale, whether the price is paid in cash or in goods;" but "where

[1] Gray v. Barton (1873), 55 N. Y. 68, 14 Am. R. 181; Parkinson v. State (1859), 14 Md. 184, 74 Am. Dec. 522; Commonwealth v. Packard (1855), 5 Gray (Mass.), 101; Beaver v. Beaver (1889), 117 N. Y. 421, 15 Am. St. R. 531, 22 N. E. R. 940.

[2] See *ante*, § 1.

[3] See Bouv. Law Dict. (ed. 1897); Commonwealth v. Davis (1876), 12 Bush (Ky.), 240; Cooper v. State (1881), 37 Ark. 412.

[4] Picard v. McCormick (1862), 11 Mich. 68; Huff v. Hall (1885), 56 Mich. 456, 23 N. W. R. 88.

one chattel is exchanged for another, no price being attached, it is not a sale."[1]

§ 14. ——. In many of the cases the price was to be paid partly in cash and partly in goods, but this was a mere accident, and is not the criterion. Thus, where a horse was transferred for the sum of $50, and the owner received in exchange three notes of third persons amounting to $49.14, and also eighty-six cents in money, the transaction was held to be a sale. "In the absence of express evidence that an exchange only was intended," said the court,[2] "a sale might justly be inferred from the fact that the trade was governed by a fixed price for the horse, an agreed price being essential to a proper bargain or sale, but altogether needless in the case of a mere exchange. There the commodities exchanged, whatever be their supposed value, are mutually received as equivalents for each other. It must be taken, then, that the horse was sold to the defendant at the price of $50." So where the plaintiffs delivered to the defendant, at various times, dry-goods out of their store to a large amount, in consideration of which and in payment whereof the defendant agreed to deliver to the plaintiffs, on or before a day specified, nails at a price per pound agreed upon, it was held to be a sale of the dry-goods on credit to be paid for in nails, and neither a purchase of the nails, nor an exchange of the dry-goods for the nails.[3]

§ 15. ——. But where, on the other hand, plaintiff delivered wood to the defendant, who agreed to return a like amount to the plaintiff whenever he should desire it, it was held to be a mere exchange, and not a sale;[4] and so where a filly, which had been bought and was valued at a given price, was exchanged for another horse, it was held not to be a sale.[5]

[1] Fuller v. Duren (1860), 36 Ala. 73, 76 Am. Dec. 318.

[2] Loomis v. Wainwright (1848), 21 Vt. 520.

[3] Herrick v. Carter (1865), 56 Barb. (N. Y.) 41.

[4] Mitchell v. Gile (1841), 12 N. H. 390.

[5] Fuller v. Duren (1860), 36 Ala. 73, 76 Am. Dec. 318.

§ 16. —— Uses of distinction — Pleading.— This distinction between sale and barter usually becomes material rather as a question of pleading than otherwise, the rule being that in the case of the mere exchange, where no value has been agreed upon, an action must be based upon the special contract;[1] while if a price has been fixed and the transaction amounts to a sale, an action may be maintained upon the basis of goods sold.[2]

It also becomes material occasionally to determine whether a barter is to be deemed a sale within the purview of statutes using the latter word. In Indiana a barter has been held not to be a sale within the meaning of a statute regulating the sales of intoxicating liquors;[3] and the same ruling was made by the court in Alabama when construing a penal statute against the sale of slaves without a license;[4] but in Massachusetts a contrary result was reached with reference to a statute against the sale of liquor, the court saying that "the prohibition of sales, in the technical sense of that word, would be of little effect if the trade was left open to be carried on in other modes."[5] In the same state also a contract for the exchange of land for goods and money was held to be equivalent to a sale within the contemplation of the statute of frauds.[6]

§ 17. —— Waiving tort — Construction of authority.— The distinction may be of importance also with reference to the right of one whose goods have been wrongfully sold to waive

[1] See Mitchell v. Gile (1841), 12 N. H. 390; Slayton v. McDonald (1881), 73 Me. 50; Vail v. Strong (1838), 10 Vt. 457; Beirne v. Dunlap (1837), 8 Leigh (Va.), 514.

[2] See Forsyth v. Jervis (1816), 1 Stark. 437, 2 Eng. Com. L. 169; Porter v. Talcott (1823), 1 Cow. (N. Y.) 359; Hands v. Burton (1808), 9 East, 349; Way v. Wakefield (1835), 7 Vt. 223.

Mr. Travis, who collates many other cases, contends that the whole distinction between sale and barter is without legal foundation. Travis on Sales, p. 7 *et seq.*, and notes.

[3] Stevenson v. State (1879), 65 Ind. 409; Massey v. State (1881), 74 Ind. 368.

[4] Gunter v. Lecky (1857), 30 Ala. 591.

[5] Howard v. Harris (1864), 8 Allen (Mass.), 297; Commonwealth v. Clark (1860), 14 Gray (Mass.), 367.

[6] Dowling v. McKenney (1878), 124 Mass. 478.

the tort and sue in *assumpsit*. "The doctrine of waiving a tort and bringing *assumpsit*," it is said in such a case,[1] "is confined to cases where the defendant has disposed of the plaintiff's property and received either money or some article or thing as money.[2] If the property has been sold, it makes no difference whether the price is received in money or in a chattel at an estimated price for money.[3] But there is a material distinction between a sale and an exchange or a bargain of barter; and where one chattel is exchanged for another, no price being attached, it is not a sale."

Attention must also be paid to this distinction in the construction of authorities, it being clear, for example, that an authority to sell goods would not ordinarily justify an exchange of them for other goods.[4]

§ 18. —— **Otherwise distinction not usually material.**— In most other cases, however, the distinction is of little practical importance. "The distinction between a sale and exchange of property," said the court in Massachusetts,[5] "is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property."

[1] Fuller v. Duren (1860), 36 Ala. 73, 76 Am. Dec. 318.

[2] Citing Pike v. Bright, 29 Ala. 336; Crow v. Boyd, 17 Ala. 51; Strother v. Butler, 17 Ala. 733. See also Watson v. Stever (1872), 25 Mich. 386; Woods v. Ayres (1878), 39 Mich. 345; Fiquet v. Allison (1864), 12 Mich. 330; Coe v. Wagar (1879), 42 Mich. 52; McLaughlin v. Salley (1881), 46 Mich. 219; Nelson v. Kilbride (1897), 113 Mich. 637, 71 N. W. R. 1089.

[3] Citing Arms v. Ashley, 4 Pick. (Mass.) 71; Mason v. Waite, 17 Mass. 560; Stewart v. Conner, 9 Ala. 813; Cameron v. Clarke, 11 Ala. 259.

[4] See Mechem on Agency, § 352, where this subject is fully considered.

[5] In Com. v. Clark, *supra*. See also Hudson Iron Co. v. Alger (1873), 54 N. Y. 173; First Nat. Bank v. Reno (1887), 73 Iowa, 145, 34 N. W. R. 796.

§ 19. Sale to be distinguished from bailment.— The contract of sale, whether executed or executory, is to be distinguished from a mere bailment. The contract of sale, as has been seen, contemplates the transfer to the purchaser of the absolute title to the property for a price in money or its equivalent. The contract of bailment, on the other hand, contemplates the transfer of a special property only, the bailor retaining all of the time the general property in the goods which are to be returned to him or his order, either in their original form or in such other form or equivalent as the parties have agreed upon.

§ 20. ——. "It is of the essence of a contract of sale," it is said in a recent case,[1] "that there should be a buyer and a seller, a price to be given and taken, an agreement to pay and

[1] Union Stock Yards v. Western Land Co. (1893), 59 Fed. R. 49, 18 U. S. App. 438, 7 C. C. A. 660. The facts here were as follows: Under contracts between H. and a cattle company, H. agreed to transport certain cattle to his farm in Missouri at his own expense, and there feed them, that they might be profitably marketed by the cattle company; and he covenanted that they should not deteriorate in flesh or condition, and bound himself to pay at an agreed valuation for all losses of the cattle arising from "death, disease, escape, theft, or any cause whatsoever." H. was to employ, at his own expense, a herdsman selected by the cattle company. The pasturage was to extend over a period of some fourteen weeks, during which time the cattle company should ship the cattle to market or sell them in pasturage. H. was to receive in full compensation for his services and expenditures all moneys realized from the sale of the cattle by the cattle company in excess of $36.05 per head after deducting the expenses of shipment and sale, and he also waived any lien upon the cattle for his own services. H. received the cattle under the contracts, and subsequently gave a chattel mortgage on certain of the cattle and parted with the possession of the same. The cattle company thereafter brought an action in replevin to recover possession of certain of the cattle which H. had mortgaged. *Held*, (1) that the contracts constituted a bailment of personal property, and that H. was a mere agister with compensation for service contingent upon the price obtained upon the sale of the cattle; (2) that in the contracts there was wanting an agreement to pay a price for the cattle, which is an essential element of a sale; that there was no conditional sale of the cattle to H., because in no event was H. to be invested with the title, and in any event he was to return the cattle to the cattle company, which, and not H., had the power of disposition of the cattle; (3) that as it may well comport with

an agreement to receive. Sale is a word of precise legal import. 'It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.'[1] A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties as found in their agreement. There are, however certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed.[2] If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment.[3] In a contract

a bailment of property that the bailee assumes the character of insurer of the thing bailed, while it remains in his possession, the clause in the contract providing that H. should be liable for all losses of said cattle "arising from death, disease, escape, theft, or any cause whatsoever," read in connection with other provisions of the contract, with which it was necessary to read it in order to judge of its meaning, imposed upon H., in the care of the cattle while in his custody, the liability of an insurer, and did not, when so read in connection with other clauses of the contract, make the transaction one of conditional sale; (4) that there was nothing in the contract which imposed upon H. accountability for depreciation in market value; (5) that, even if H. had an option under the contract to pay to the cattle company a stated sum per head for the cattle, and could so obtain title to them, there was no obligation on his part to do so, since an option is not a sale, and possession of property under an option to purchase, when possession is delivered for service to be rendered the thing bailed, does not transmute into a conditional sale that which is otherwise a bailment; and (6) that there was no design evidenced by the contracts, read in the light of the surrounding circumstances, to avoid sections 2505, 2507 and 2508 of the Revised Statutes of Missouri of 1879.

[1] Williamson v. Berry, 8 How. 495, 544.

[2] South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Jones on Bailment (2d ed.), pp. 64, 102; 2 Kent's Com., p. 589.

[3] Powder Co. v. Burkhardt, 97 U. S.

of sale there is this distinguishing test common to an absolute and to a conditional sale, that there must be an agreement, express or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed.[1] If service is to be rendered the subject-matter of the bailment, there must be compensation for the service unless the bailment be a mandate. In a contract of condition sale the agreement to pay the purchase price may be masked so as to give it the appearance of an agreement to pay for use. In such case the court must ascertain the real intention of the contracting parties from the whole agreement read in the light of the surrounding circumstances." Here, too, as in other cases already considered, the name which the parties have seen fit to apply to their contract is not at all conclusive. Each contract is to be construed according to its true tenor and legal effect regardless of particular expressions or peculiar names applied.[2]

§ 21. —— Change of form or substance as the test — Illustrations.— Where the identical article delivered is to be returned in its original form, no difficulty in discrimination arises; but where, as is common, the form of the original article is to be changed, or something else is to be returned as a substitute for it, difficulties arise. In a late case[3] it is said: "The funda-

110, 116; Sturm v. Boker, 150 U. S. 312, 329.

[1] Heryford v. Davis, 102 U. S. 235.

[2] Thus, in Weiland v. Sunwall (1895), 63 Minn. 320, 65 N. W. R. 628, tickets issued on the receipt of wheat were in the following form: "Ticket No. ——. Bought ——, account of —— ——, or bearer, —— bushels, No. —— wheat. [Signed] —— ——, New Prague Elevator Company." But stamped on the ticket were the words "Stored. Not transferable." Said the court: "The fact that these tickets commenced with the printed word "Bought" is by no means conclusive that the transaction was a sale and not a bailment, especially in view of the fact that the word "Stored" was stamped on the ticket at the time it was issued. The evidence was sufficient to justify a finding that these transactions were, as between the depositors and the elevator company, bailments, and not sales, so that the wheat remained the property of the former." See also Irons v. Kentner (1879), 51 Iowa, 88, 33 Am. R. 119, 50 N. W. R. 73.

[3] Bretz v. Diehl (1888), 117 Pa. St. 589, 11 Atl. R. 893, 2 Am. St. R. 706. In Mallory v. Willis (1850), 4 N. Y.

mental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter there is no obligation to return the specific article; the party receiv-

85, Chief Justice Bronson states the distinction thus: "Where the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed: it is a sale."

In Powder Co. v. Burkhardt (1877), 97 U. S. 110, the facts were that an incorporated company entered into a contract with D., the owner of letters-patent for an explosive compound called "dualin," whereby he undertook to manufacture it, as required by the company from time to time, in quantities sufficient to supply the demand for the same, and all sales produced or effected by the company. The contract provided that all goods he manufactured should be consigned to the company for sale, and all orders he received should be transferred to it to be filled; that the parties should equally share the net profits arising from such sales, and equally bear all losses by explosion, or otherwise, so far as the loss of the dualin was concerned, but the company assumed no risk on D.'s building or machinery; that the company should semi-monthly advance to him, on his requisition, a stipulated sum, for paying salaries, for labor, and for his personal account, and such further reasonable sums as might be required for incidental expenses of manufacture; and should furnish him all the raw materials needed to manufacture said explosive in quantities sufficient to supply the demand created by the company, or should advance the money necessary to purchase them — the said advances and the cost of such materials to be charged to him against the manufactured goods to be by him consigned to the company. Certain of the materials which had been furnished him under the contract, and others which he had purchased with money advanced by the company, were seized upon an execution sued out on a judgment against him in favor of a third party. The company then brought this action to recover for the wrongful conversion of the materials so seized. *Held*, that the delivery of them by the company to D. did not create a bailment, but that upon such delivery they, as well as those purchased by him with the money so advanced, became his sole property and, as such, were subject to the execution. Said the court: "The plaintiff in error contends that the present is the case of a bailment and not of a sale or a loan of the goods and money to Dittmar. It is contended that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags

ing it is at liberty to return some other thing of equal value in place of it."

Thus, a delivery of wheat "to be manufactured into flour," of which flour one barrel is to be returned to the depositor for every four and one-quarter bushels of wheat, is a bailment for hire; though the form of the original wheat is to be changed, it is still the original wheat in its altered form which is to be returned.[1]

§ 22. —— On the other hand, a delivery of wheat for which the depositor is to receive one barrel of flour for every four and one-quarter bushels of wheat, the party receiving being at liberty to deliver any flour, whether made from that identical wheat or not, is not a bailment but a sale.[2] In a case[3] of the latter nature, the court said: "There is here no agreement to restore to him property of like quality, nor is there any agree-

into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law. Pierce v. Schenck, 3 Hill (N. Y.), 28; Norton v. Woodruff, 2 N. Y. 153; Mallory v. Willis, 4 id. 76; Foster v. Pettibone, 7 id. 433."

In Chickering v. Bastress (1889), 130 Ill. 206, 22 N. E. R. 542, 17 Am. St. R. 309, the court says: "It is well settled in this state that when the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return, and the title to the property is changed — it is a sale. Lonergan v. Stewart, 55 Ill. 49, and the authorities there cited; Richardson v. Olmstead, 74 id. 213."

[1] Foster v. Pettibone (1852), 7 N. Y. 433, 57 Am. Dec. 530; Slaughter v. Green (1821), 1 Rand. (Va.) 3, 10 Am. Dec. 488; Inglebright v. Hammond (1850), 19 Ohio, 337, 53 Am. Dec. 430; Mallory v. Willis (1850), 4 N. Y. 85.

[2] Woodward v. Semans (1890), 125 Ind. 330, 25 N. E. R. 444, 21 Am. St. R. 225; Smith v. Clark, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213. (Seymour v. Brown, 19 John. (N. Y.) 44, *contra*, is overruled.) Baker v. Woodruff, 2 Barb. (N. Y.) 523; Norton v. Woodruff, 2 N. Y. 153.

[3] Woodward v. Semans, *supra*.

ment to restore to him the product of the property. The agreement is to yield property in exchange for property, and this is essentially a contract of sale. The appellees were entitled to a designated quantity of flour and bran for each bushel of wheat delivered by them, but they were not entitled to the flour and bran produced from the particular wheat delivered by them to the appellants. There was therefore no undertaking to restore the wheat either in its original form or in an altered form."

In cases of the first class it would be immaterial, as will be seen,[1] that the miller, by virtue of a custom or agreement, was to mingle the wheat with other of like kind and quality from the mass of which the grinding is to be done, so long as the mass remains and the depositor has the right to demand the return of a like amount out of the mass.[2]

§ 23. —— **Further illustrations.**— Many other cases present like considerations. Thus a delivery of logs, to be cut into boards of which each party is to have half, is a bailment and not a sale,[3] as is also an agreement to deliver milk to be made into cheese, even though the bailee may also be authorized to sell the product as the agent of the owner.[4] But where

[1] See following sections.

[2] Slaughter v. Green, 1 Rand. (Va.) 3, 10 Am. Dec. 488; Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430.

[3] Pierce v. Schenck (1842), 3 Hill (N. Y.), 28; Gleason v. Beers (1887), 59 Vt. 581, 10 Atl. R. 86.

[4] First National Bank v. Schween (1889), 127 Ill. 573, 20 N. E. R. 681, 11 Am. St. R. 174. After referring to the distinction laid down in Lonergan v. Stewart, 55 Ill. 48, substantially as stated in the text, the court says: "If the power of sale conferred had not been given, there can be no doubt that the owners of the milk would have owned its product. In such case, the identical thing, though in an altered form, would be required to be delivered, and would be the property of the owners of the milk. As soon as the milk was converted into butter and cheese, Kilbourne's (the bailee's) power to sell as a factor attached, and he took the same as the agent of the milk owners, holding the title for them until a sale was effected. This may be more clearly apparent by supposing a revocation of his authority to sell. Can there be any doubt as to the legal ownership of the butter and cheese in such case? It is true, the manufacturer might have held it until his charges for its manufacture were paid; but, subject to his lien for his commission, it would have belonged to the party

the milk contributed by the various owners was thrown into a common mass, made into cheese, sold by a committee of the factory, and then the milk was paid for at the price produced by the cheese, allowing ten and a half pounds of milk to one pound of cheese, and deducting the cost of manufacturing, the court said: "There was evidently no bailment or agency as to the particular milk delivered. By the very terms of the agreement, it was to be mixed and confused in part or in whole with other milk indefinitely. It was a sale of the milk to the factory, for which they were to pay at a certain time and in a certain manner. It is not to be distinguished from *Jenkins v. Eichelberger*.[1] There the contract was to deliver hides to a tanner at a certain price — the hides when tanned to be returned to the person who had delivered them, to be sold by him, and out of the proceeds, after deducting the price at which they had been delivered, the balance to be paid to the tanner. It was evidently a contrivance by which the hides were to be protected from the creditors of the tanner, but this court held it to be a sale. The same doctrine was maintained in *Prichett v. Cook*.[2] It is true in both these cases the question was as to creditors of the manufacturer. But upon the facts . . . it does not appear that there was anything to qualify the effect of the absolute delivery of the milk, to be used and mixed indiscriminately with other milk, and for which the party was afterwards to receive a credit at a certain rate (and he) had then, from the delivery of the milk, a mere demand for the price of its product as agreed upon."[3]

Under facts quite similar to those in *Jenkins v. Eichelberger*, the court in Massachusetts found a different intention to exist,

who employed him to manufacture it." See also Jensen v. Bowles (1896), 8 S. Dak. 570, 67 N. W. R. 627.

A mere bailment, and not a sale which passes title, is made by a contract whereby farmers deliver produce at a factory owned by them to be manufactured into pickles, sauerkraut and other similar articles, the proceeds of the sales thereof to be divided in a certain ratio between the farmers and the manufacturers. Sattler v. Hallock (1899), 160 N. Y. 291, 54 N. E. R. 667, 46 L. R. A. 679.

[1] 4 Watts (Pa.), 121, 28 Am. Dec. 691.

[2] 12 P. F. Smith (62 Pa.), 193.

[3] Butterfield v. Lathrop (1872), 71 Pa. St. 225.

and held that a delivery of leather to a manufacturer to be made into boots which were to be returned to the bailor, who was to sell them and give to the manufacturer all over the cost of the leather and five per cent. thereon, constituted a bailment and not a sale.[1] *A fortiori* is it so where leather is delivered to be made into shoes and returned to the owner of the leather, even though the manufacturer was to supply another kind of leather which was needed in the manufacture.[2]

§ 24. —— **Intention of parties as the test.**— Where, though the parties use language on its face indicating a sale, their real intention is that of bailment, the transaction will be so determined. Thus, in one case,[3] A. deposited wheat with B., receiving a memorandum as follows: "Bought of A. for B., to be delivered at his elevator, according to sample, wheat No. 3, at owner's risk as to fire," and the wheat was placed in a bin by itself, where it remained until it was destroyed by accidental fire. No demand was made for the wheat until after the fire, but a few

[1] Schenck v. Saunders (1859), 13 Gray (Mass.), 37.

[2] Mansfield v. Converse (1864), 8 Allen (Mass.), 182. See also Brown v. Hitchcock, 28 Vt. 452; Bulkley v. Andrews, 39 Conn. 70.

[3] Irons v. Kentner (1879), 51 Iowa, 88, 33 Am. R. 119, 50 N. W. R. 73.

In Johnston v. Browne, 37 Iowa, 200, the ticket, or memorandum, given by Browne on receiving the grain in the elevator was in these words: "Bought of H. F. Bickett, for W. P. Browne, to be delivered at Browne's elevator, if all like sample, —— of wheat, at $——, in store, —— buyer, —— bushels, —— lbs." It was shown in that case, by extrinsic evidence, that the understanding of the parties was that Browne, the proprietor of the elevator, was to ship and sell the grain on his own account, and, when the depositor desired to sell, Browne was to pay the highest price for the grain or return a like quantity and quality. The transaction was held to be a sale, and not a mere storage or bailment of the grain.

In Nelson v. Brown, 44 Iowa, 455, the ticket, or memorandum, delivered to the depositor read: "Received of C. C. Cowell, for Thompson, in store, for account and risk of C. C. Cowell, one hundred and eighty-three bushels No. 3 wheat. Loss by fire, heating and the elements at the owner's risk. Wheat of equal test and value, but not the identical wheat, may be returned." It was held in that case that so long as the wheat remained in the elevator, though thrown in a common bin with wheat of like quality, the transaction was a mere bailment."

days before the fire B. offered A. a certain price for it, which was refused. It appeared that it was the custom at the place in question for the warehouseman to mix all wheat of the same grade in one common bin, to keep a sample, and then to ship the mass away for sale; and, when the parties depositing the wheat got ready to sell it, to buy it of them, if possible, and if not, then to return wheat of the same grade and quality as that deposited. When left on storage for more than a month, a storage fee was charged.

Said the court. "It was admitted the grain was delivered in pursuance of the alleged custom or usage, and it was shown that it was in the elevator in a separate bin when it was burned, and that the defendant offered to purchase it on the Saturday before the fire. These facts, when taken in connection with the ticket, show clearly that the transaction was not a sale, but a bailment. It is true that the word 'bought' in the ticket, unexplained, would import a sale, but when taken in connection with the expression 'at owner's risk of fire,' and in the light of the parol evidence, it clearly appears that a sale was not contemplated by the parties. 'At owner's risk of fire' evidently means that so long as the wheat should remain in the elevator the plaintiff should bear that risk. If it was a sale, it is not at all probable that any such words would have been used. In such case the warehouseman would have assumed the risk without any stipulation to that effect."

§ 25. **Same subject — Commingling of goods — Effect of custom.** — Though a bailment thus ordinarily contemplates the return of the identical article in its original or changed form, still the agreement of the parties, as evidenced by express words or by their acquiescence in an established custom, may permit the substitution of another article of like kind whose return will satisfy the contract of bailment. This is illustrated in the common case of the deposit of grain in a bin or elevator with other grain of like kind, from the mass of which the bailor's grain is to be returned to him, but which mass is at all times to be kept good to provide for such return. Thus in a

late case in Indiana,[1] Nixon was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and it was also his custom to sell wheat from this bin. Not knowing of this latter custom, Rice deposited wheat with Nixon, and it was put into this bin with other wheat deposited by other persons or bought by Nixon, and from this mingled wheat Nixon sold from time to time, but there was always wheat enough in the bin to supply all depositors, until by accidental fire the warehouse and the wheat were destroyed. No demand was made for the wheat until after the fire, and there was no agreement that Rice should have the option to demand the grain or its value in money, nor had Nixon any option to return the value in money instead of the wheat. This was held to be a bailment and not a sale.

Said the court: "The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of

[1] Rice v. Nixon, (1884), 97 Ind. 97, 49 Am. R. 430. [The court cited Lupton v. White, 15 Vesey Jr. 432; 2 Kent Com. (12th ed.) 365, 590; Story, Bailm., § 40; Law of Prod. Ex., § 152; 2 Schouler, Pers. Prop., § 46; 6 Am. L. Rev. 457; 2 Bl. Com. (Cooley's Ed.) 404, n.; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. R. 637, 42 Am. R. 474; Nelson v. Brown, 44 Iowa, 455; Sexton v. Graham, 53 Iowa, 181; Nelson v. Brown, 53 Iowa, 555; Irons v. Kentner, 51 Iowa, 88, 33 Am. R. 119, 50 N. W. R. 73. Pribble v. Kent, 10 Ind. 325, 71 Am. Dec. 327; Ewing v. French, 1 Blackf. (Ind.) 353; Carlisle v. Wallace, 12 Ind. 252, 74 Am. Dec. 207, and Ashby v. West, 3 Ind. 170, were distinguished or reconciled.] To the same effect as the principal case are Bottenberg v. Nixon, 97 Ind. 106; McGrew v. Thayer, 24 Ind. App. 578, 57 N. E. R. 262. In Woodward v. Semans (1890), 125 Ind. 330, 25 N. E. R. 444, 21 Am. St. R. 225, it is said: "It is the law of this jurisdiction, as well as of many others, that where a warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle, from which sales are made, the warehouseman keeping constantly on hand grain of like kind and quality for the depositor, and ready for delivery to him on call, the contract is one of bailment and not of sale," citing Rice v. Nixon, *supra;* Bottenberg v. Nixon, *supra;* Schindler v. Westover, 99 Ind. 395; Lyon v. Lenon, 106 Ind. 567, 7 N. E. R. 311; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. R. 585, 58 Am. R. 417; Morningstar v. Cunningham, 110 Ind. 328, 59 Am. R. 211, 11 N. E. R. 593. See also Baker v. Born, 17 Ind. App. 422, 46 N. E. R. 930; McGrew v. Thayer, 24 Ind. App. 578, 57 N. E. R. 262.

contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade

warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him."

§ 26. ——. In another case,[1] where wheat of different depositors had been commingled with the bailee's own, but the latter had no right to draw from the common stock more than his own share, the court said: "If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it; where, however, the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole can, of course, have no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product.[2] It makes no difference that the bailee had, in like manner, contributed to the mass of his own wheat; for although the absolute owner of his own share, he still stands as bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment." The effect of such a commingling with no right of sale in the bailee is to make all the depositors tenants in common of the mass, the interest of each being measured by the amount called for by his receipt. If the warehouseman also contributes of his own grain to the mass, he becomes a tenant in common with the others.[3]

[1] Bretz v. Diehl (1888), 117 Pa. St. 589, 2 Am. St. R. 706, 11 Atl. R. 893.

[2] Citing Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Hutchison v. Commonwealth, 82 Pa. St. 472.

[3] Hall v. Pillsbury (1890), 43 Minn. 33, 44 N. W. R. 673, 19 Am. St. R. 209; O'Dell v. Leyda (1889), 46 Ohio St. 244, 20 N. E. R. 472; Sexton v. Graham (1880), 53 Iowa, 181, 4 N. W. R. 1090.

§ 27. ——. **Commingling with right of sale or use in bailee.** In the cases of commingling thus far noticed there was no right on the part of the bailee, without keeping on hand a stock sufficient to satisfy the bailor's demand, to sell or otherwise dispose of the mass and render to the bailor, instead of his original deposit, either other property or money. Where this right exists a new element is introduced. This new element may be introduced at different stages in the transaction. Thus —

§ 28. ——. I. The grain may have been originally deposited in a common mass upon which the bailor's claim was to attach, and from which he would be entitled at any time to demand and receive his proper share, subject, however, to an express or implied term that the bailee might draw from the common stock, and, if he consumed the whole so that the bailor's portion could not be returned, that he should thereupon be deemed a purchaser. There would here be a contract of bailment which might ripen into a sale upon a contingency. In one case[1] of this nature it is said that "though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and re-

[1] Ledyard v. Hibbard (1882), 48 Mich. 421, 12 N. W. R. 637, 42 Am. R. 474. To like effect, see Nelson v. Brown (1876), 44 Iowa, 455. See also Smith v. Smith (1892), 91 Mich. 7, 51 N. W. R. 694.

In State v. Rieger (1894), 59 Minn. 151, 60 N. W. R. 1087, wheat was deposited and a receipt given stating: "The conditions on which this wheat is received at this elevator are that Rieger [the warehouseman] has this option: either to deliver the grade of wheat that this ticket calls for, or to pay the bearer the market price for the same, less elevator charges, on surrender of this ticket." *Held* to be a bailment and not a sale. Speaking of the receipt above referred to, the court said: "All it amounted to, in our judgment, was an option on the part of the defendant, when the receipt was presented, to pay the market price of the grain instead of returning the grain in specie; and this option he could only exercise when the receipt was presented, and by paying the money. It never contemplated that he might treat the wheat as his own without first paying for it. If he elected to buy, it was to be a purchase for cash and not on credit."

ceive his proper quantity at any time if so much remained in store. But if the quantity in store is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of the receipts would be any different. It is true, if the wheat is all consumed and the amount in store is not kept good so that a demand for wheat can be responded to, and if the consumption is by consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale; but so long as grain is kept in store from which the receipts may be met, the fair presumption is that it is intended they shall be so met, and the presumption would only be overcome by some act unequivocal in its nature." In cases of this class the transaction continues a bailment so long as the depositor has the right to demand the return of his share of the grain and the mass remains to supply the demands of the depositors; and it only becomes a sale when subsequently, but in accordance with an express or implied agreement, the bailee is permitted to become a purchaser and to dispose of the whole mass. The mere fact of such disposition, however, is not the criterion, but it is the express or implied agreement that such a disposition may be made. Without such agreement the disposing of the whole would amount to a conversion, but not a sale; but with it, it is not a conversion, but is a sale.

§ 29. ——. II. In other cases, the right of immediate disposal or consumption may be granted to the warehouseman at the moment of the delivery, the depositor retaining no right to demand the return of his share of the mass, unless the warehouseman elects to so return it, the latter having the option whether to return the original or like grain or to pay the value in money. In such cases the transaction is held to constitute a sale.[1] In one case the distinction is thus stated: "If the

[1] Lyon v. Lenon, 106 Ind. 567, 7 N. E. R. 311; Barnes v. McCrea (1888), 75 Iowa, 267, 39 N. W. R. 392, 9 Am. St. R. 473; Johnston v. Browne, 37 Iowa, 200; Woodward v. Boone, 126 Ind. 122, 25 N. E. R. 812; Cloke v. Shafroth, 137 Ill. 393, 27 N. E. R. 702; Reherd v. Clem (1889), 86 Va. 374, 10 S. E. R. 504; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. R. 244.

dealer has the right, at his pleasure, either to ship and sell the same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only where the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrender to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is: Can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale."[1]

§ 30. ——. III. Other cases present the features of sale in a more marked aspect. Thus in one case[2] it appeared that the owner of wheat deposited it with a miller to be paid for on

See also Coquard v. Wernse, 100 Mo. 137, 13 S. W. R. 341.

[1] Lyon v. Lenon, *supra;* enforcing same distinction, James v. Plank, 48 Ohio St. 255, 26 N. E. R. 1107.

[2] Jones v. Kemp (1882), 49 Mich. 9, 12 N. W. R. 890. To like effect, where wheat was deposited to be paid for at whatever might be the price in twenty days (Woodward v. Boone (1890), 126 Ind. 122, 25 N. E. R. 812); and where wheat was deposited and tickets given which might be presented at any time, and which entitled the holder to the market price on the day of presentation. Weiland v. Sunwall (1895), 63 Minn. 320, 65 N. W. R. 628; Weiland v. Krejnick (1895), 63 Minn. 314, 65 N. W. R. 631. But where the manager of an elevator, when wheat was brought to it, asked the owner if he wished to sell, and if he did, paid cash, but if he did not, gave a deposit ticket, it was held presumptively a bailment and not a sale. Weiland v. Krejnick, *supra.*

In Rumpf v. Barto (1894), 10 Wash. 382, 38 Pac. R. 1129, goods were delivered to a person under an agreement evidenced by a memorandum as follows: "These goods are sent for your inspection, the property of Rumpf & Mayer, and to be returned to them within demand days. Sale only takes effect from date of their approval of your selection, and until then goods are to be held subject to their order." The transaction constitutes a bailment and not a conditional sale.

Where a person receives goods under an agreement by which he is to keep them during a certain period, and if within that time he pays for them he is to become the owner, but otherwise is to pay for the use of them, he receives them as

delivery or at any subsequent time when the depositor demanded it, at the price current at the time of demand. It was also understood that the miller might — as he did — mix it with his own grain and grind from the mass as he desired. The depositor subsequently demanded payment, but before payment was made the miller failed. The court below held that this was a mere bailment, but the supreme court said: "We think this was erroneous. The plaintiff reserved no right to recall his wheat or any wheat or flour in its place. Defendant reserved no right to return it actually or in kind. He was bound at all events to keep it, and to pay for it on demand, while the money was payable without any contingency. This was a sale and delivery at once and without any credit on which defendant could rely. He was bound to have his money always ready, and to pay when called on."

§ 31. Bailment with privilege of purchase to be distinguished from sale. — In dealing with the questions arising out of grain, some illustrations have already been given of

a bailee, and the property in the goods is not changed until the price is paid. Brown Bros. v. Billington (1894), 163 Pa. St. 76, 29 Atl. R. 904.

In McClelland v. Scroggin (1892), 35 Neb. 536, 53 N. W. R. 469, it appeared that by a written agreement S. leased to M. six hundred and forty acres of land and a large amount of personal property thereon, consisting of live-stock and farming implements, of the agreed value of $23,331. It was provided in said agreement: "That when said M. shall pay to said S. the sum of $23,331, with interest thereon at the rate of ten per cent. per annum, together with the rents above specified, and all sums which S. may advance to or for said M., with interest thereon, then all the above property shall be conveyed to him, the said M., together with all increase thereof. Until such payment such property shall be and remain the property of S., together with the increase thereof, and should any of said property be sold by consent of S., the proceeds thereof shall be applied upon the above indebtedness." *Held*, not a conditional sale, but an agreement to sell at the election of M., and that the relation of the parties with respect to said property is that of bailor and bailee only.

But in Barnes v. Morse (1890), 38 Ill. App. 274, where the contract was otherwise clearly a contract of sale, it was held that a clause in the contract that "goods not sold this year will be carried on next year's time" did not make the contract one of bailment rather than sale.

bailments to which is annexed the privilege of buying the property at some time in the future. But other cases also present this feature in almost countless forms. The various contracts, sometimes called "leases with a right of purchase," but more frequently classed under the general term "conditional sales," are illustrations of such transactions, to which more detailed consideration will be hereafter given.[1] But for the present purpose —

§ 32. —— Option to buy and pay for chattel, or pay for its use. — "Where, by the contract," it is said in one case,[2] "the vendee receives a chattel which he is to keep for a certain period, and if in that time he pays for it the stipulated price, he is to become the owner, but, if he does not pay the price, he is to pay for its use, the vendee receives it as bailee, and the right of property is not changed until the price is paid." In a later case[3] in the same state the court says that it is a bail-

[1] See *post*, Book II, ch. III.

[2] Rose v. Story (1845), 1 Pa. St. (1 Barr), 190, quoted in Enlow v. Klein (1875), 79 Pa. St. 488, where are cited Clark v. Jack, 7 Watts (Pa.), 375; McCullough v. Porter, 4 W. & S. 177, 39 Am. Dec. 68; Lehigh Co. v. Field, 8 W. & S. 232; Rowe v. Sharpe, 51 Pa. St. 26; Becker v. Smith, 59 Pa. St. 469; Henry v. Patterson, 57 Pa. St. 346. In Enlow v. Klein the facts were that Enlow agreed with Moritz to furnish him with a team of horses, wagons, etc., for country peddling; he to pay Enlow $5 per week, in two hundred payments; the team, etc., "to belong to and be managed by Enlow until the last of the two hundred payments;" Moritz to keep up all repairs, and if a horse should die to replace him at his own expense; Enlow "to relinquish all his right, etc., to Moritz when the last payment is made of the two hundred." *Held* to be a bailment. See also Mt. Leonard Milling Co. v. Insurance Co. (1887), 25 Mo. App. 259.

[3] Chamberlain v. Smith (1863), 44 Pa. St. 431. In this case A. received from B. a yoke of oxen "to keep and work in a reasonable, farmer-like manner for the term of one year; said cattle to be returned in one year." At the same time A. delivered to B. another animal for the use of the cattle. The contract also provided that A. "has the privilege, by paying $40 and legal interest at the expiration of the year, to keep the said cattle."

In Middleton v. Stone (1886), 111 Pa. St. 589, 4 Atl. R. 523, A. delivered to B. two colts under a contract that B. should safely keep and sell them, if possible, for A. at a fixed price before a certain date, and, if not sold, to return them in good condition to A. This was held a bailment and not a sale, though B. had also the right under the contract to

ment and not a sale; a bailment with a refusal of the chattel for a specified time.

At the same time, it is easy here, as it has been found to be in other cases, to attempt to disguise what is really a sale under the cloak of a mere bailment. Thus where, by the terms of a written contract, Mary Hicks "leased" to John Summerson a pair of horses "for the sum of one hundred and twenty-five dollars, to be paid by the first of April, 1886; and in case the said John Summerson shall fail to make said payment as above agreed," then the said Mary Hicks to have "full and free possession of said team," it being "further agreed that the ownership shall remain in hands of Mary Hicks until payment is made in full," it was held that there was a sale and not a bailment or leasing. Said the court: "We are unable to agree entirely with the view taken by either of the parties. Both appear to have been in some degree misled by looking at the name and not at the substance of the contract. It is called a lease, but is manifestly a sale. No term is stipulated for the hiring, nor any rate per month or per annum. On the contrary, it is merely said that the horses are leased for a lump sum of one hundred and twenty-five dollars. But what is conclusive of the character of the transaction is the stipulation that 'the ownership shall remain in Mary Hicks until payment is made in full.' If it was merely

keep the colts himself upon paying a price fixed for them. Under the circumstances of the case the latter clause was held immaterial, though the court said, "But even as to that, the question at issue being between the original parties only, no creditors being interested, the title could not pass without the actual payment of the money, and hence this part of the contract cannot convert the whole into a sale."

In Hart v. Carpenter (1856), 24 Conn. 426, B. took the plaintiff's cow into his possession under an agreement that he should be paid for her keeping by the milk she would yield; and if, at any time within four months, he should pay the plaintiff $35, the title to the cow should vest in him. B. did not pay for the cow, but sold and delivered her to the defendant, who bought her in good faith, supposing her to be the property of B. In an action of trover against such purchaser it was held that the plaintiff was entitled to recover. See also Nichols v. Ashton (1892), 155 Mass. 205, 29 N. E. R. 519.

a hiring, the ownership would have remained in Mrs. Hicks all the time without any such stipulation."[1]

§ 33. Delivery of goods on trial to be purchased if approved is not a present sale.— So the delivery of goods on trial to be bought and paid for, if the prospective purchaser approves of them, and, if not, to be returned, does not constitute a present sale, and the title does not pass until approval express or implied.[2] Within what time this option is to be exercised, what is the effect of a failure to disapprove within the time agreed upon, and what, if any, notice of disapproval may be required, are questions which will be considered in later sections.[3]

§ 34. Sale with option to return or pay.— To be distinguished from the cases referred to in the preceding section are those in which the option is precisely the reverse, that is, that the article is purchased and shall be paid for, unless it is returned. An option to purchase if one likes is radically different from an option to return a purchase if he does not like. In the former case the title does not pass until the option is exercised; in the latter case it passes at once, subject to the right to rescind and return under the conditions agreed upon.[4]

Within what time this option is to be exercised, and what is the effect of a failure to exercise it as agreed, are subjects which are reserved for fuller treatment in another place.[5]

§ 35. Bailment or sale, how determined — Law or fact.— The question of bailment or sale, like that hereafter to be con-

[1] Summerson v. Hicks (1890), 134 Pa. St. 566, 19 Atl. R. 808. So in National Car & L. Builder v. Cyclone Steam Snow Plow Co. (1892), 49 Minn. 125, 51 N. W. R. 657, where there had been a contract by defendant to pay to plaintiff a sum of money when a certain snow-plow was sold, the court held that a "lease" of the plow for ninety-nine years, with the right in the lessee to use, alter, rearrange or improve the machine according to its own judgment, and without stipulating for the return of the plow, or the payment of any rent, was really a sale.

[2] See *post*, §§ 675–685, Book II, chapter III, where many other forms of sale upon condition are considered.

[3] See *post*, §§ 681–685.

[4] See *post*, §§ 657–662, Book II, chapter III, where this and kindred subjects are more fully discussed.

[5] See *post*, §§ 659–662.

sidered of sale or consignment, may be one to be decided by the court or the jury as the circumstances of each case may determine. Where the whole transaction is represented in a written contract before the court, its legal effect as creating sale or bailment is a question of law for the court;[1] and this would be true though there were no such writing, if the facts were agreed upon. The most common case, however, is the one in which the facts are controverted or the intention in dispute, and in these cases the question, under proper instructions, is one of fact for the jury to determine.[2]

§ 36. **Sale to be distinguished from mortgage.**— So sale is to be distinguished from mortgage, which, in most of the states, is a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation, though, in some states, it is regarded, like the mortgage upon land, as a mere lien upon the property rather than a conditional sale. The distinction between a sale and a mortgage or pledge is usually so obvious as not to require extended consideration. Still —

§ 37. **Sale to be distinguished from pledge.**— Sale is likewise to be distinguished from pledge, which is a deposit of personal property by way of security for the performance of some act, usually the payment of a debt. Here though the goods are delivered to the pledgee, who acquires a special property in them, the general property remains all of the time in the pledgor until his title has been divested, after default, by a foreclosure of his right to redeem.

§ 38. —— **Sale and not a pledge.**— The criterion here, as in other cases, is usually the intention of the parties. The mere fact that one delivers goods to another to whom he is indebted

[1] Chickering v. Bastress (1889), 130 Ill. 206, 22 N. E. R. 542, 17 Am. St. R. 309 (citing Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Hervey v. Rhode Island L. Works, 93 U. S. 664; Heryford v. Davis, 102 U. S. 235; Fish v. Benedict, 74 N. Y. 613).

[2] Crosby v. Delaware & Hud. Canal Co. (1890), 119 N. Y. 334, 36 N. E. R. 332.

is not enough to stamp the transaction as a pledge. The goods may have been delivered in *payment* of the indebtedness and not as security for it, or, what is in effect the same thing, they may have been sold to the creditor in consideration of the discharge of the debt. Thus, in one case,[1] a person who had a judgment against another accepted from the latter goods found to be worth $600, agreeing to credit him to the amount of $350, and, if the goods should sell for more than this, to credit him also with the excess after deducting the expenses of the sale. This, it was urged, constituted a pledge and not a sale; but Dillon, J., held otherwise, saying that there was no objection to a *bona fide* transaction of this sort, and that the stipulation for contingent additional compensation did not *ex necessitate* transmute the sale into a pledge or mortgage. So where the treasurer of a savings bank made an absolute assignment of a mortgage belonging to the bank to a person who paid full value for it, agreeing to resell it to the bank if the bank subsequently wished to buy it, the transaction was held to be a sale and not a pledge; and the fact that the treasurer afterward paid interest on the mortgage to the assignee was held not to show an agreement by the bank to treat the transaction as a loan.[2]

§ 39. —— **Pledge and not sale.**— But where, on the other hand, one delivers a chattel to another as security for a debt, or as indemnity for a suretyship therein, the law regards the transaction as a pledge and not as a sale;[3] nor does it alter the case in equity[4] or, generally, at law,[5] that the property was transferred by an absolute or unconditional bill of sale or assignment, or even if it be expressly stipulated that the pledge shall be irredeemable.[6] So it is a pledge and not a sale where a receipted bill of parcels has been given, accompanied by a

[1] Reeves v. Sebern, 16 Iowa, 234, 85 Am. Dec. 513.

[2] Commonwealth v. Savings Bank (1884), 137 Mass. 431.

[3] Morgan v. Dod (1877), 3 Colo. 551; Upham v. Richey (1896), 163 Ill. 530, 45 N. E. R. 228; Berry v. Monroe (1885), 57 Mich. 187, 23 N. W. R. 724; O'Neil v. Walker (1893), 45 La. Ann. 609, 12 S. R. 872.

[4] See following section.

[5] See following section.

[6] Morgan v. Dod, *supra*.

formal delivery of the goods, but in reality intended only as security for a debt.[1]

§ 40. —— Parol evidence to show apparent sale to be pledge or mortgage.— Some conflict of opinion exists as to the admissibility of parol evidence to show that a transaction, on its face a sale, was in reality but a pledge or mortgage. Where the transfer is not accompanied by written evidence, no difficulty exists; but where the property has been transferred by a deed or formal bill of sale purporting to convey an absolute title, the courts are not agreed upon the admissibility of parol evidence to show that the transfer was, in reality, only as security, and that the transaction was therefore a pledge or a mortgage. By many of the courts it is held that such evidence is not admissible at law,[2] though it may be in equity;[3] but other courts hold that as between the original parties or those not *bona fide* purchasers, the true nature of the transaction may be shown at law as well as in equity,[4] and such has been declared to be the weight of authority.[5] But even where the former rule prevails, it does not apply to mere informal instruments, such as a bill of parcels.[6] The evidence, however, it is said, must be clear and convincing.[7]

§ 41. Sale to be distinguished from mere agency to buy. So a contract for sale is to be distinguished from a mere agency

[1] Shaw v. Wilshire, 65 Me. 485, citing Eastman v. Avery, 23 Me. 248; Beeman v. Lawton, 37 Me. 543; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Hazard v. Loring, 10 Cush. (Mass.) 267; Walker v. Staples, 5 Allen (Mass.), 34.

[2] Philbrook v. Eaton, 134 Mass. 398; Pennock v. McCormick, 120 Mass. 275; Harper v. Ross, 10 Allen (Mass.), 332; Hartshorn v. Williams, 31 Ala. 149; Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767.

[3] Jones on Chat. Mortgages, § 22.

[4] Fuller v. Parrish, 3 Mich. 211; Jones v. Rahilly, 16 Minn. 320 (citing Belote v. Morrison, 8 Minn. 62; Phenix v. Gardner, 13 Minn. 432; Russell v. Southard, 12 How. (U. S.) 139; Hodges v. Insurance Co., 4 Seld. (N. Y.) 419; Chester v. Bank, 16 N. Y. 343; Smith v. Beattie, 31 N. Y. 542); Travers v. Leopold, 124 Ill. 431, 16 N. E. R. 902.

[5] Jones v. Rahilly, *supra*.

[6] Hazard v. Loring, 10 Cush. (Mass.) 267; Hildreth v. O'Brien, 10 Allen (Mass.), 104.

[7] Travers v. Leopold, 124 Ill. 431, 16 N. E. R. 902.

to buy. Thus in a case[1] in Ohio it appeared that the parties had entered into an agreement evidenced by the following writing: "Canton, Feb. 7, 1848. Received one hundred and seventy-five dollars as an advance to buy barley for Wm. Webb, for which I do agree to deliver one thousand bushels of barley to Mr. Reynolds' warehouse in Massillon, at thirty-five cents per bushel, by the middle of April next — the said barley to be good merchantable barley." Signed "John Black." Black thereupon proceeded to buy barley, and in February had purchased and stored in Reynolds' warehouse over six hundred bushels, when the warehouse was washed away by a flood, and the barley was lost. Black afterwards purchased enough more to make up a thousand bushels, including that lost, and on April 15th tendered to Webb the warehouse receipts for that washed away and the barley on hand, as a compliance with his agreement. Webb refused the tender, though he was willing to accept the barley on hand as so much on account. It appeared also that Webb had often gone to Black's store, where he bought the barley, and had examined it, and on one occasion had condemned a load as of poor quality.

Said the court: "There is but a single question growing out of the facts in this case. Was Black the agent of Webb in purchasing this barley at Massillon? or was he the vendor of a thousand bushels of barley to Webb, to be delivered within a given time, at a certain place, and for a stipulated price? If the former, the law will cast the loss upon his principal; but if the latter, the misfortune will be his own, unless he had perfected a delivery of the grain before the accident."

[1] Black v. Webb (1851). 20 Ohio, 304, 55 Am. Dec. 456. In the note to this case the editor says: "A rule similar to that laid down in the principal case was followed in each of those cited below: Rodee v. Wade, 47 Barb. (N. Y.) 53; Jennings v. Gage, 13 Ill. 610, 56 Am. Dec. 476; Kelly v. Upton, 5 Duer (N. Y.), 336; Lane v. Neale, 2 Stark. 105; Lovelace v. Stewart, 23 Mo. 384; Low v. Freeman, 12 Ill. 467; Shields v. Pettie, 4 N. Y. 122; Brown v. Brooks, 7 Jones (N. C.), 93; Leonard v. Winslow, 2 Grant's Cas. (Pa.) 139; Shaw v. Nudd, 8 Pick. (Mass.) 9; Phillips v. Hunnewell, 4 Greenl. (Me.) 376; Garrett v. Crooks, 15 La. Ann. 483; Roberts v. Beatty, 2 Pen. & Watts, 67, 21 Am. Dec. 410; McDonald v. Hewett, 15 Johns. (N. Y.) 351, 8 Am. Dec. 241; Penniman v. Hartshorn, 13 Mass. 87."

The court then proceeded to apply various tests, and found in the language of the agreement, and in the facts that Webb was not affected by a rise or fall in the market, and would not have been responsible to the persons from whom Black might buy on credit, and could not dictate as to the place or time or conditions of Black's purchases, and had no control over the barley in the warehouse until delivered to him, conclusive evidence that Black "purchased this barley, not as the agent or factor of William Webb, but on his own private account, and for the purpose of filling a contract of sale, entered into and then subsisting between himself as the vendor and William Webb as the vendee. In this view of the subject, the risk of the property would remain with Black until he should deliver the barley or transfer the contract thereof to Webb. The loss happened before such delivery or transfer, and must be borne by Black alone."

§ 42. ——. But in a recent case in Michigan[1] it appeared that a retail grocer, in ordering goods of a wholesale dealer, had on some occasions included in his order, at the request of a friend, a quantity of goods which the latter had received and paid for at what they cost. On one of these occasions the friend refused to receive or pay for the goods, and the grocer sold them at a loss, and brought action against the friend to recover. The defendant contended, among other things, that the transaction amounted to a sale and was void under the statute of frauds because not evidenced by writing, but the court held that it was not a sale, but a case of agency to buy, and the plaintiff was permitted to recover.

§ 43. **Sale to be distinguished from agency to sell or consignment.**— Sale, further, is to be distinguished from the creation of an agency to sell. The essence of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner sell-

[1] Hatch v. McBrien (1890), 83 Mich. 159, 47 N. W. R. 214.

ing his own goods, and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent.

Agencies to sell are very common; the most familiar types of such agents being the factor or commission merchant, and the general dealer who receives goods for sale under what is usually termed a "consignment." In the ordinary cases of this nature, the title to the goods remains in the consignor or principal until sale, and the factor or consignee does not become liable as a purchaser except, according to the weight of authority, when he has sold under a *del credere* commission.[1]

§ 44. ——. A qualified form of "agency" which has grown up in modern times is that which exists when the owner or manufacturer of patented or other proprietary articles grants the privilege of sale or of exclusive territory to one who otherwise might not be at liberty to sell the goods in question. It is entirely consistent with this arrangement that the so-called agent is to buy, of the proprietor or manufacturer, the goods which he is thus authorized to sell, and when this is the fact there is little more of "agency" in the case than the name itself. It is also entirely consistent with the arrangement that the "agent" is to sell the goods at a price or upon terms or conditions fixed by the proprietor or manufacturer. A person so situated is often, in popular language, said to have obtained the "agency" for the goods, when all that is meant is that he has obtained a more or less exclusive right to buy and resell them in a prescribed territory. The transaction is simple enough, but the reports show many cases in which the par-

[1] See Mechem on Agency, § 1014; *post*, § 49 and notes.

ties have, perhaps, deceived themselves and have certainly attempted to deceive others by calling that an "agency" which had no resemblance to agency in fact, but was simply a sale of a proprietary article with a right of resale under terms and conditions fixed by the proprietor.

§ 45. ——. It is, moreover, entirely possible that the relations of the parties may change, or be susceptible of change, during the progress of the transaction. Thus there may be the creation of a genuine agency to sell, but, coupled with it, the right of the agent to himself become the purchaser if he so desires, or a stipulation that in a certain contingency — as if he sells at a different time or price than that fixed — he shall or may be treated as a purchaser. In such a case, if the contingency contemplated occurs, the transaction will cease to be an agency to sell and will become a sale.[1]

[1] See Ex parte White (1871), L. R. 6 Ch. App. 397. The question here was whether one Nevill, to whom Towle & Co. had delivered goods, was to be regarded as a purchaser of the goods or only as agent of Towle & Co. for their sale. Said Mellish, J.: "It appears to me that the real question is, when Nevill sold the goods, did he sell them as the agent of Towle & Co., so as to make Towle & Co. the vendors, and the persons to whom he sold, purchasers from Towle & Co.? — or did he sell on his own account, so as to create the relation of purchaser and vendor between himself and Towle & Co., and again the relation of vendor and purchaser between himself and the persons to whom he sold? Now, it is said that he was a *del credere* agent, and no doubt it requires a very minute examination of what the course of business is, to distinguish between a *del credere* agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account. And no doubt persons may suppose that their relationship is that of principal and agent, when in point of law it is not. It is quite clear that Nevill, if he sold these goods, was to pay Towle & Co. for them, at a fixed price — that is to say, a price fixed beforehand between him and them — and at a fixed time. Now, if it had been his duty to sell to his customers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this,

§ 46. —— **Principles of construction.**— The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute,[1] of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a

that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time — in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells: and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract of purchase with his alleged principal, and is again reselling. But if, in addition to this, he is allowed to change the character of the goods — if he may turn wheat into flour, or grey goods into dyed or bleached goods, and to sell those changed goods on any terms, and at any price he pleases — that makes it still clearer that he is not selling on account of a principal, but that he is selling on his own account; for, of course, if he were selling on account of his principal, and the principal could sue upon those contracts, the principal must be liable to be sued upon them."

[1] As, for example, in Braunn v. Keally (1891), 146 Pa. St. 519, 23 Atl. R. 389. 28 Am. St. R. 811, where the purpose was to avoid the statute of Pennsylvania against the sale of oleomargarine; and Norwegian Plow Co. v. Clark (1897), 102 Iowa, 31, 70 N. W. R. 808, where the purpose was to avoid compliance with a recording act.

sale under the guise of an agency,[1] while others have been drawn with a view to having them construed as contracts of sale or agency as might best suit the convenience or subserve the purposes of their framers.[2]

In construing these anomalous instruments, courts look chiefly at the essential nature and preponderating features of the whole instrument and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract.[3] Misfitting or misleading names may be very easily applied, but they cannot be permitted to conceal or change the legal nature of the instrument. If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a "special selling factor appointment," or have expressly stipulated that the alleged factor "shall never purchase such goods for his own account."[4] So with regard to the use of the term "consign:" it may express the true state of the case, and, if so,

[1] Thus in Braunn v. Keally, *supra*, the court say: "Notwithstanding the ingenious color of agency thus sought to be thrown over it, this is a contract of sale."

[2] In Arbuckle v. Kirkpatrick (1897), 98 Tenn. 221, 39 S. W. R. 3, 36 L. R. A. 285, the court say: "The contract is certainly a remarkable one, partaking in many of its provisions of a contract of agency and in many others of a sale. It is evidently intended as either or both, as might suit the convenience or subserve the purposes of the complainants. It purports to be copyrighted, for what reason is not stated; but the copyright is evidently procured on account of the unusual and extraordinary provisions of the instrument (if there be a copyright)."

[3] In Heryford v. Davis (1880), 102 U. S. 235, in dealing with an analogous question, the court, by Justice Strong, said: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." To the same effect: Hervey v. Locomotive Works (1876), 93 U. S. 664; Sturm v. Boker (1893), 150 U. S. 312.

[4] As in Arbuckle v. Kirkpatrick, *supra;* Arbuckle v. Gates (1898), 95 Va. 802, 30 S. E. R. 496; Snelling v. Arbuckle (1898), 104 Ga. 362, 30 S. E. R. 863; Hutton v. Lippert (1883), 8 App. Cas. 309.

it will be given effect;[1] or it may be a mere subterfuge, and if it be the latter "there is no magic in that word which can take from the transaction its real character."[2] The same rules would, of course, apply were the word "sold" or "bought" used.

In doubtful cases, moreover, these ambiguous contracts are construed most strongly against their framers, if such a construction is necessary to protect the rights of others. As remarked in one case of such a contract: "In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction."[3]

§ 47. —— **Illustrations of construction.**— The cases involving this question have now become so numerous, and the variety of forms of contract so great, that it would be impracticable to attempt a full exposition of them in the text. A few typical cases only will therefore be selected, leaving to the footnotes the fuller exposition of the residue. Thus —

§ 48. —— **Agency and not sale.**— In one case,[4] often referred to, it appeared that Benson and Sears had entered into a contract, a copy of which is set forth in the margin. While oper-

[1] As in Sturm v. Boker (1893), 150 U. S. 312, where the contract was contained in letters stipulating for the consignment of goods for sale, the proceeds over a certain amount to be divided between the parties, and the unsold goods returned. The court said that it was "too clear for discussion or the citation of authorities that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consigned' employed in the letters were used in their commercial sense, which meant that the property was committed or intrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other." And it was further held that this result was not to be changed because, in sending the goods under the contract, they were billed as goods "bought." To same effect: Dittmar v. Norman (1875), 118 Mass. 319.

[2] Chickering v. Bastress (1889), 130 Ill. 206, 22 N. E. R. 542, 17 Am. St. R. 309.

[3] Arbuckle v. Kirkpatrick, *supra*.

[4] Eldridge v. Benson (1851), 7 Cush. (Mass.) 483. The contract read as follows: "Said Robert Sears . . . agrees to furnish such good and responsible persons as the said George W. Benson . . . may designate

ating under this contract, Eldridge, as creditor of Benson, had attached, as the property of the latter, the books in the hands of the agents. Sears thereupon intervened, claiming that the books attached were his property and therefore not subject to such attachment, thereby making it necessary to determine whether the contract between himself and Sears amounted to a sale or only to the creation of an agency to sell. It was held that the latter was the true construction. Bigelow, J., said: "The contract is inartificially and obscurely drawn, and it is somewhat difficult to ascertain the precise purport of all its stipulations; but upon a careful consideration of its several provisions we are of the opinion that it created between the parties the relation of principal and agent, and not that of vendor and vendee. The leading feature of the agreement, which of itself would be quite sufficient to determine its meaning, is the right reserved to the defendant to return such portion of the books, delivered to him under the contract, as might not be disposed of by the agents. Such a stipulation is wholly inconsistent with an absolute sale of the property to the defendant, and clearly indicates the intent of the parties to have been that the right of property should remain in the claimant (Sears). The elementary definition of a sale is the transmutation of property from one man to another; but no such change takes place when it is agreed between the parties that the prop-

or elect to act as agents for the sale of Sears' Pictorial School Library, with said works at $13.50 per set of twelve volumes, to said Benson, supplying their orders and receiving their remittances, and placing all money so received, above the amount of $13.50 as above specified, to the credit of said Benson, and at the close of the labors of the said agents to receive all the books returned by them uninjured and credit the same to said Benson at the cost price above specified; and the said George W. Benson . . . hereby guarantied to said Robert Sears the security and full payment of the above-named price of $13.50 per set . . . as may be delivered to all such persons as he (Benson) may appoint and to whom he may direct said books to be sent. It is further agreed between said parties that settlements shall be made quarterly for all bills contracted by said Benson on his accounts." See also the numerous cases cited in the following note; also Brown v. Church Co., 55 Ill. App. 615; Keystone Watch Case Co. v. Fourth Street Nat. Bank (1900), 194 Pa. St. 535, 45 Atl. R. 328.

erty may be returned to the person from whom it was received. To test and illustrate the correctness of this principle, as applicable to the case at bar, let us suppose all the agents to have been unsuccessful in disposing of the books, and, at the close of their efforts to sell the work, to have had on their hands all which they originally received from the claimant. By the terms of the contract the defendant would have the right to return to the claimant all of the books which had been received. By construing this contract, therefore, as a contract of sale by which the property became vested in the defendant, we should be led to the necessary but absurd conclusion that a vendee to whom the absolute right of property had passed could still retain the right of returning it to his vendor." Another reason leading to the same conclusion was found in the fact that the agents appointed by Benson might order books direct of Sears and remit the proceeds to him, and the provisions for charging and crediting were held to be intended to show the extent of Benson's liability under the guaranty for the agents.[1]

§ 49. —— **Sale and not agency.**— On the other hand, in a case typical of the more modern and more complicated form of contract, a contrary result was reached. Here Arbuckle Bros., the manufacturers of a certain brand of coffee, had made with Kirkpatrick & Co., who were retail dealers, a contract to supply the latter with the coffee for sale upon the terms set forth in the margin.[2] Kirkpatrick & Co. having made an assignment for the benefit of their creditors, Arbuckle Bros. sought

[1] Many other cases to the same effect will be found stated in the following note.

[2] Arbuckle Bros. v. Kirkpatrick (1897), 98 Tenn. 221, 39 S. W. R. 3, 36 L. R. A. 285, 60 Am. St. R. 854.

The contract here was in the following form:

"Form C.—*Special Selling Factor Appointment.*

"Arbuckle Brothers.

"Subject to prompt acceptance we take pleasure in appointing you a special selling factor for our roasted coffee, restricting and defining your duties and obligations by the following provisions, to wit:

"I. That all goods consigned on your requisitions on us shall, until sold in regular course of business, and to *bona fide* retail customers, remain our property, with the title in us, and shall merely be held by you as our factor, and shall at all times be subject to our order for disposal or removal on payment of all claims

to recover the coffee unsold and the proceeds of that sold, upon the ground that Kirkpatrick & Co. were merely agents, and that the title to the coffee unsold, and to the proceeds of that

against them for advances of money made to us, and all charges for drayage, storage and insurance.

"II. That you shall never purchase such goods for your own account.

"III. That such goods shall be sold and billed by you in your own name, but only as our factor, according to the laws relating to factors, and only at such prices and on such terms as we may give you from time to time.

"IV. That you shall guaranty the sale of each consignment, and the payment therefor, within sixty days from its date, and shall assume all risk as to the credit of the parties to whom you sell, and make all collections for goods sold, at your own expense.

"V. That you shall remit us the full amount of each consignment, less the commissions as herein provided, by the end of such sixty days, at a price designated to you at the time of the consignment, whether the whole of said consignment shall have been sold by you or not, and whether or not you shall have collected the proceeds thereof.

"VI. That you shall insure us against any decline in the price of the unsold goods held by you as our factor.

"VII. That you shall be entitled to any advance in the price of such unsold goods; and

"VIII. That you shall be entitled to the following allowances and commissions, to wit:

"(1) For carting and storing, one-eighth cent per pound.

"(2) For insuring against fire, wind and water, one-eighth cent per pound.

"(3) For insuring payment, one-eighth cent per pound.

"(4) For insuring against decline in price, one-eighth cent per pound.

"(5) For selling the goods, one cent per pound.

"IX. That, in addition to the above, we shall, on all advances made to us prior to ten days from date of consignment, allow a discount of one per cent., and on advances made after ten days, but prior to sixty days, we shall allow interest at the rate of six per cent. per annum for the time between date of said advance and said sixty days.

"X. That if you neglect to remit to us the full amount of any consignment, less the commissions as herein provided, by the end of sixty days from its date, we shall make draft upon you, and allow you a selling commission of only one-half of one cent per pound; and if said draft be returned unpaid, we shall only allow you a selling commission of one-fourth of one cent per pound; and if you do not remit us within four months from date of each consignment, no commissions or discounts of any nature whatever will be allowed.

"XI. That you will maintain our established selling price, terms, conditions, and limitations of consignment in such states and territories as may be designated by us; but, in the event of any violation thereof, you are to pay us the sum of fifty dollars ($50) for every such violation.

"XII. That this factor appointment may be revoked by us at any time at

sold, was still in Arbuckle Bros. After reviewing many cases the court said: "Without attempting to run a parallel between the present case and those which have been cited and com-

our option. Copyright, 1891, by Arbuckle Bros."

This appointment was accepted by Kirkpatrick & Co. on January 28, 1895, in the following language: "Dear Sir: We beg to herewith accept your appointment as 'Special Selling Factor' of your roasted coffees, subject to all the provisions, limitations, and obligations expressed in your notice of appointment, Form C, dated at New York, January 28th, 1895."

Under this contract, from February 5, 1895, to April 3, 1895, twenty-five different lots of five cases each of this coffee were received by Kirkpatrick & Co., the value of which was $3,041.70. The coffee was sold usually in one-case lots, and almost daily, and Kirkpatrick & Co., before making their assignment, April 6, 1895, had collected upon such sales $830.55, and used the proceeds in their business. Four cases were on hand when the assignment was made, and these were delivered up to the plaintiffs upon their demand, by the assignee, as before stated. For the remainder there were accounts on the books of Kirkpatrick & Co. against their customers, and these accounts were transferred, and went into the hands of the assignee. The accounts for coffee sold by Kirkpatrick to their customers were not kept separate from other items sold them, but the amounts and names of customers can be traced from the books by culling out the items relating to coffee. Kirkpatrick & Co. had never paid or advanced anything on consignments now in question, and complainants have received nothing thereon.

The court, in its opinion, said:

"Complainants claim that Kirkpatrick & Co. were their 'special selling factors,' so constituted by the written agreement above set out, and that coffee was consigned to and sold by Kirkpatrick & Co. as such. It is therefore maintained by them: (1) That the money collected by Kirkpatrick & Co. upon sales of coffee consigned to them was complainants' money; and, as Kirkpatrick & Co. mingled same with their own, and finally used it in their business, the claim, therefore, is a preferred one, and must be first paid out of assets in hands of assignees; and (2) complainants are entitled to follow into assignees' hands all unpaid accounts created for sales of Arbuckle coffee on or subsequent to February 5, 1895. Such indebtedness belongs to complainants because created upon sales of their goods by their factor. These contentions were denied by the chancellor and the court of chancery appeals, the latter holding that the contract between the parties amounted, in legal effect, to a sale of the coffee to Kirkpatrick & Co. Complainants have appealed, and assign the above-stated actions of courts below as error.

"Defendants contend, on the other hand: (1) That the contract itself is a sale, and not an agency or factor contract. The mere name given it does not determine its status or effect. (2) That even if, under the contract, the title to the goods de-

mented upon, we merely state some of the more prominent features which we think characterize this contract as one of sale, and not of agency. It will be noted that under no circumstances did other staple articles in its stock, to whom it pleased, when it pleased, and in whatever territory it pleased, and, so far as we can see, on whatever time it pleased. It rendered no account of sales to complainants, and was not called upon to do so. In its sales to its retail merchant customers this coffee was sold and billed and shipped with other goods, and when its accounts were collected from its customers, embracing these coffees, the proceeds were deposited with the general funds of the firm, and paid out on its checks in meeting its current liabilities. For a while the firm paid for this coffee by its checks upon its bank in the city of Nashville, just as it paid any other demand upon it. Upon objection being made to receiving these checks in payment, the firm opened an account with a firm of New York bankers, and forwarded checks upon them to complainants in settlement; and these checks appear to have been received without question or objection until the assignment of the firm. The complainants never inquired whether their coffees were insured, or whether this firm paid for storage, or anything of the kind.' Other facts found by that court have already been adverted to, and still others will be mentioned hereafter so far as necessary.

"Kirkpatrick & Co. are called in the contract 'special selling factors,' and the instrument a 'special selling factor appointment.' Still the proper construction of the contract is not dependent on any name given to the instrument by the parties, and not

livered to Kirkpatrick & Co. would remain in Arbuckle Bros. until they were sold by Kirkpatrick & Co., when sold, Kirkpatrick & Co. became mere debtors of Arbuckle Bros. for what was due for the coffee.

"The correct determination of this case must depend upon the proper construction of the written agreement between the parties, and their course of dealing between themselves. Complainants claim that agreement above set out constituted Kirkpatrick & Co. their factors under a *del credere* commission, and that this firm in all things acted as such. The court of chancery appeals report that: 'This firm operated under a previous contract with these complainants for several years. This prior contract was quite similar in its provisions to the one in this case. It was slightly different in one or more of its terms, but the course of dealing of the parties between themselves, so far as we can see from the record, did not change in any particular material to the issue in dispute. The complainants had a warehouse in Nashville, with a man in charge of it, in which they kept a supply of their coffees. When the defendant firm wanted any coffee, it notified the agent of complainants of the quantity wanted, and it was supplied, with a bill or statement, on a prescribed form, of the price and terms of the transfer or consignment, conforming in general outline with the provisions of the contract made with their merchants dealing in their coffees. When delivered, the firm sold the coffees as

cumstances were any goods ever to be returned to Arbuckle & Co. All must be paid for in sixty days, whether sold or not. There is no stipulation to buy at the expiration of sixty days,

on any one provision, but upon the entire body of the contract, and the legal effect of it as a whole. Singer Manufacturing Co. v. Cole, 4 Lea, 439, 40 Am. R. 20; Cowan v. Manufacturing Co., 92 Tenn. 376, 21 S.W. R. 683; Heryford v. Davis, 102 U. S. 244. We think it very evident that whether we regard the contract as one of sale, or simply one creating an agency to sell, is not material, so far as the money already collected from sales and expended by Kirkpatrick & Co. is concerned. The amounts received by them for such sales have not been kept separate from their other funds, and it does not appear that any of the proceeds went into the hands of the assignee, or into the purchase of goods that came to his possession. Those sums have been expended in the general business of Kirkpatrick & Co., but for what purpose does not appear, and they are not traced or identified, and cannot be. As to the money already paid in, Kirkpatrick & Co. are debtors, as they are for any other funds used by them from goods sold and not paid for, and this must be the case whether they received the proceeds of the sale as their own or as agents; and, unless they were kept separate and identified, no trust can be imposed upon the funds or goods in the assignee's hands. Story, Ag. (8th ed.), p. 290, § 229; 3 Am. & Eng. Enc. Law, 344, and cases cited; Akin v. Jones, 93 Tenn. 353, 27 S. W. R. 669, 42 Am. St. R. 924, 25 L. R. A. 523; Sayles v. Cox, 95 Tenn. 579, 32 S. W. R. 630, 32 L. R. A. 715, 49 Am. St. R. 940. The four cases on hand when the assignment was made have been delivered up to complainants, and as to them there is now no controversy, and the only remaining question is whether the amounts due Kirkpatrick & Co. on account for coffee sold can be successfully claimed by complainants. If so, it can only be upon the theory that Kirkpatrick & Co. were the agents of Arbuckle Bros. to sell their coffee, and on the theory that the proceeds after sale and before collection, as well as the coffee before sale, remained the property of complainants. In determining this question it is not material to consider whether the agency (if it be held to be such) is one of ordinary character, or whether the agents in this case occupy the status of factors under a '*del credere* commission.' The court of chancery appeals was of opinion that, while there were many features of the contract that indicated agency on the part of Kirkpatrick & Co., there were others, and especially the fifth and sixth sections, which could only be construed as rendering the contract one of sale, and not agency. These two clauses, as will be seen, provide that Kirkpatrick & Co. shall remit for all coffees at the end of sixty days, whether sold or not, and whether the proceeds have been collected or not; and the firm is made to guaranty complainants against any decline in price, and entitled to any advance; and in the tenth clause the complainants are authorized to draw drafts if remittances were not made in proper time. The learned court of chancery appeals say, in

but the contract clearly contemplates a payment without further bargain, when that time arrives, and implies a present sale, on a credit of sixty days. Kirkpatrick & Co. could sell

substance, that complainants cannot receive the price of the goods, and afterwards claim the goods themselves; and when the price is paid the property could not be longer claimed. It is insisted that these provisions in the contract cannot be considered, because, as a matter of fact, Kirkpatrick & Co. were not made liable for any coffees at the expiration of sixty days, nor were they called upon to make good any decline in price, and hence the conditions allowing these sections to be looked to have not arisen. It is true, none of the funds involved in this case arise directly from the operation of these sections, but they are parts of the same entire contract, and prescribe the rights and liabilities of the parties under the contingencies named, and must be looked to, in order to determine the real intent, force and effect of the instrument. They are not detachable, nor to be considered alone, nor is the remainder of the contract to be considered without them.

"We have been cited by the very able counsel of complainants to a large number of cases construing contracts more or less like the contract now under consideration, and it is claimed the principles laid down in them are conclusive in consideration of this contract. Among the cases cited for complainants are: Metropolitan Nat. Bank v. Benedict Co., 36 U. S. App. 604, 20 C. C. A. 377, 74 Fed. R. 182; Burton v. Goodspeed, 69 Ill. 237; Norton v. Melick, 97 Iowa, 564, 66 N. W. R. 780; Walker v. Butterick, 105 Mass. 237; National Cordage Co. v. Sims (Neb.), 62 N. W. R. 514; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99; Lenz v. Harrison (Ill.), 36 N. E. R. 567; Balderston v. Rubber Co., 18 R. I. 338, 27 Atl. R. 507, 49 Am. St. R. 772; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. R. 482, 22 L. R. A. 850, 45 Am. St. R. 846; National Bank v. Goodyear, 90 Ga. 711, 16 S. E. R. 962; Milburn Mfg. Co. v. Peak, 89 Tex. 209, 34 S. W. R. 102; Moline Plow Co. v. Rodgers, 53 Kan. 743, 37 Pac. R. 111, 42 Am. St. R. 317. We examine these cases with reference to the case now on trial.

"Metropolitan Nat. Bank v. Benedict Co., 36 U. S. App. 604, 20 C. C. A. 377, 74 Fed. R. 182. Stern Auction & Commission Company agreed with Benedict & Co., manufacturers of clothing, as follows: 'We agree to realize for consignment of ready-made clothing of Benedict & Co., as per memorandum received of its president, net prices as per same, without any charges of commissions, freight, or any other charges. We agree to keep amount of consignment at all times until agreement expires fully insured, and that no part of consignment shall remain unsold or unpaid by February 1, 1895; and we shall also be entitled on any cash payment before February 1, 1895, to one and one-half (1½) per cent. a month for unexpired time.' In a contest between Benedict Company and parties claiming consigned clothing under bill of sale given in payment of debt due from commission company, it was held: 'The contract between the Benedict Company and

when and on what time they chose; but no matter how sales were made, the amount to be paid was fixed in advance, whether sold or not, whether collected or not. No account of

the Stern Auction & Commission Company was not a sale, but a contract of factorage. The stipulations of the contract are not appropriate to a contract of sale. If it was a sale, and the commission company acquired an absolute title, what concern was it of the Benedict Company when they were sold? When one merchant sells goods to another, the seller never requires the buyer to enter into a covenant that he will sell the goods within a specified time. Such a requirement is inconsistent with the dominion over the property which absolute ownership confers. The money to be paid by the commission company was not upon a sale of the goods to that company, but upon a sale of the goods by that company. . . . The commission company covenanted that no part of the consignment should 'remain unsold or unpaid by February 1, 1895.' A failure to sell the goods and account for the same at the prices fixed within the time agreed upon would be a breach of this covenant on the part of the commission company, for which the Benedict Company might recover damages; but such breach of the contract would not have the legal effect to convert the bailment into a sale. . . . The goods not sold would still remain the property of the Benedict Company. There is no provision in the contract for a change of title from the consignor to the consignee in any event. Tested by the written agreement, the contract was clearly one of bailment." In this case, while the goods were in store, the company failed, and sold to the bank all its stock, expressly excepting the goods on hand on consignment. The president of the bank was notified that the Benedict goods would not be included in the sale, and a special clause in the bill of sale was inserted for the purpose of excluding them. The bank, however, claimed the goods, and Benedict & Co. sued for them. The court said the parties had a right to put their own construction on the contract, and when it was done in good faith the court would sustain the construction. It is well to note that the commission company were not to pay for the goods as on a purchase, but only to account for the proceeds of sale at prices fixed by the contract. There was no stipulation to pay for the goods at a fixed time, whether they were sold or not. In the case at bar the goods were to be paid for in sixty days, whether sold or not. It is not here claimed to be a matter for damages if sale is not made, but that it is an absolute engagement to pay, sale or no sale. In addition, the commission company expressly excepted the goods in controversy out of the transfer, while in the case at bar the accounts in controversy are expressly conveyed to the assignee.

"Burton v. Goodspeed, 69 Ill. 237. Burton and Holbrook entered into a contract substantially as follows: Burton agreed to furnish Holbrook, afloat at his dock, anthracite coal. Holbrook agreed to receive, hoist from vessel, put it on dock, pay lake freight, and charge amount paid for all this against coal, and to receive for docking, screening, selling, and

sales was to be rendered. Arbuckle & Co. had nothing to do with Kirkpatrick & Co.'s customers. They were not in privity with complainants, and no credit was given to them. If cash

delivering, including his commissions, $1.50 per ton for coal delivered outside the yard, and $1 for that delivered on the yard, and an additional commission of fifty per cent. of net profits on sales. Holbrook also agreed to guaranty payment of sales, to advance Burton on coal as shipped $3 per ton, and pay over balance of proceeds of sales as coal was sold; not to sell below market price; to keep correct accounts, and to render statement each month. The court said: 'The relation existing between appellant, Burton, and Holbrook, by virtue of their contract, is neither that of vendor and vendee nor of partners. . . . There is nothing said about selling the coal, or any interest in it, to Holbrook, nor have we been able to find any language from which we can reasonably presume that the intention of the parties was to invest him with the ownership of the property. The fact that he was to receive a portion of the net profits on sales does not prove that he was a partner, as they were given merely as part of his compensation. We think, under the evidence, Holbrook was, as to the coals shipped him for sale by appellant, Burton, a factor or commission merchant.' It is evident that this is an ordinary consignment contract. The agent was to render a correct account each month to his principal, showing amount of goods sold and prices, and did not have to pay for any goods until sold, and was only to guaranty such sales as he made; and the facts do not make it a contract similar to the one now under consideration.

"Norton v. Melick, 97 Iowa, 564 (1896), 66 N. W. R. 780. N. & Co. agreed to furnish M. certain brands of flour at specified prices, to be sold by M. for them as their agent at prices given. M. agreed to receive flour as agent of N. & Co., to pay freight and charges, to keep same in good order, to sell it at not less than given prices, to render account each thirty days, and make remittances then of the money for all merchandise sold. M. further agreed to buy any of the flour unsold at the end of ninety days at prices given, and pay therefor; and it was also agreed that title, ownership, and right of possession of the flour should remain in N. & Co. until same should be paid for in full. The court said: 'We think there ought to be no question that the contract was a mere agency for the sale of the flour. It is expressly stated in the first paragraph that the flour was to be sold by the defendant for the plaintiffs as their agent. The real inquiry is, What was the intention of the parties to the contract? That intention must prevail; and when it is plainly and unequivocally expressed in writing that it is an agency and not a sale, and the title does not pass, there is no room for construction,' etc. This contract plainly provided that the agent should render an account each month, and make remittances for all merchandise sold. The title to the flour was to remain in the principal until sold, and the agent stipulated to buy such as might be unsold at the expiration of ninety days. The flour was destroyed by fire before the

was taken, it was not to be kept separate. If notes were taken, Arbuckle & Co. had no concern in them. Kirkpatrick & Co. were to have all advance in prices and bear all declines. If

ninety days, and the principal sued the agent for its value. The court held he was not liable; that the contract was one of agency. There was no stipulation to guaranty the principal against decline in prices, nor to pay in a fixed time for each lot of goods, whether sold or not; but simply to buy at the end of ninety days.

"Walker v. Butterick, 105 Mass. 237. There was a contract between parties as follows: 'Alexander & Co. are to take goods from Walker & Co., and to return to them every thirty days the amount of sales at prices charged by Walker & Co., who will furnish Alexander & Co. all goods in their line. Alexander & Co. are worth in real estate and money $5.000.' After receiving goods, Alexander & Co. made monthly remittances, stating, in substance, that, according to contract, they remitted sales for preceding thirty days. The goods were attached by creditors of Alexander & Co. Held, the terms of contract import a consignment, and not a sale. This is a simple agency contract, and has none of the peculiar features of the contract now under consideration.

"National Cordage Co. v. Sims (1895), 44 Neb. 148, 62 N. W. R. 514. Where a contract provides for consignment of goods to be sold on commission for prices fixed by consignor, and returns at stated periods, consignee guarantying payment thereof, the relation which the law implies is that of an agency for sale upon a *del credere* commission, and not that of vendor and vendee. In this case the contract provided that the twine, as well as the proceeds of its sale, should remain the property of the principal, the proceeds to be remitted on the first day of each month. There was no obligation on the agent to buy any of the twine, or to sell it in any fixed time, and it is a case of simple agency.

"Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed. 1093. The goods were consigned to the agent to be sold by him to the best advantage, the profits realized to be divided equally between the principal and agent, and all losses to be borne by the principal. All goods unsold were to be returned to the principal. The agent was to insure the goods for the benefit of the principal, and to pay the freight. Held, that the contract was a bailment upon the terms stated. The contract contained none of the features of the Arbuckle contract.

"Lenz v. Harrison (1893), 148 Ill. 598, 36 N. E. R. 567. The contract provided that the first party appointed second party his agent to sell wagons in Henry, Ill. The second party accepted the appointment, and agreed to pay all freight charges, taxes, make good any loss or damage by fire, house them, to sell only to persons of undoubted solvency, indorse all notes taken on sales, guarantying prompt payment when due, make sales requiring final payment within twelve months from date of invoice, to transmit to first party each day all cash received from sales that day, and on the last day of each month render full account of all sales, and transmit same, with all

the goods were destroyed by fire, wind or water, it was the loss of Kirkpatrick & Co., and the insurance was optional, and only designed to place them in position to account for the

notes taken, to first party. Also, if required by first party, will take all wagons unsold at end of year, and give note for them; but this stipulation not to be a positive sale to second party unless this requirement is made by first party. Held to be a simple consignment.

"Balderston v. Rubber Co. (1893), 18 R. I. 338, 27 Atl. R. 507, 49 Am. St. R. 772. The R. Co. agreed to consign and deliver free goods to B. & D. for sale and returns, to pay B. & D. five per cent. on net amount of sales as a commission and guaranty, and also interest on any sum which they (R. Co.) might owe them. B. & D. agreed to receive goods on consignment, to use best efforts to sell to best advantage, to account to R. Co. for same at price obtained, to charge as commissions and guaranty five per cent., and to advise as to goods needed. B. & D. also agreed to advance to R. Co. at least $50,000 per month upon basis of eighty per cent. market value of goods at rate of interest specified. The prices for which B. & D. were to sell were to be fixed by R. Co. The court held: 'This was an agreement to sell goods for R. Co. under a *del credere* commission, the relation between parties being that of principal and factor. A factor who has made advances must first enforce his lien therefor against goods before looking to consignor. And, finally, a factor under a *del credere* commission is liable absolutely as a principal, and becomes a debtor to his consignor if the debt is not paid by purchaser when due; but the principal, notwithstanding liability of factor to him, may collect of his purchaser.' In this case it is to be noted that the rubber company was to pay all freights to Balderston's warehouse. Balderston was to use his best exertion to sell to the best advantage, and to account at the price received, less five per cent. There was no stipulation for a guaranty against decline in price, nor loss by fire, or other causes, nor is there any guaranty to sell, or to pay until he did sell. The contract lacks many of the features of the present one.

"Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 22 L. R. A. 850, 45 Am. St. R. 846, 18 S. E. R. 482. The contract stipulated that the safe and lock company appointed the Globe Contract Company its agent to sell safes in certain territory on fixed commissions, and agreed to furnish the agent safes on consignment. The agent was to pay for safes when it sold them, and to diligently work the territory. The agent failed, and its creditors levied on some of the safes in its charge, unsold. The court held that the safes were not the property of the agent. The contract contained none of the peculiar features of the Arbuckle contract.

"National Bank v. Goodyear, 90 Ga. 711, 16 S. E. R. 962. The contract contained stipulations that the agent should receive goods on consignment, to be sold by him as the agent of the consignor. The agent was to make monthly reports of sales of goods on hand; the title to all unsold goods and all proceeds of sales to remain in the consignor; all articles to be set-

goods. Whether the goods were carted, or stored or insured, was optional with Kirkpatrick & Co., but, in any event, they were to be credited therefor. They were allowed a sum for

tled for as soon as sold. The agent also agreed to insure, store, pay freight and all charges without expense to consignor, and have for his pay whatever the goods sold for above the invoice price. The consignor could terminate the agency at his option, and retake all goods on hand. This was held a bailment, and not a sale.

"Milburn Manufacturing Co. v. Peak (1896), 89 Tex. 209, 34 S. W. R. 102. The contract provided that the Milburn Company appointed Hood & Co. its agent to sell vehicles. Hood & Co. were to make all reasonable efforts to sell same, and settle for all vehicles sold, take all notes for goods sold on credit in the name of the Milburn Company, and remit to it all notes and cash received for the vehicles; the notes taken for the vehicles to be indorsed and guarantied by Hood & Co., and paid if the makers did not pay at maturity; the ownership of all vehicles and their proceeds of sales to remain in Milburn Company, and under no circumstances to be used by the agent. The contract is plainly very different from the Arbuckle contract.

"Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. R. 317, 37 Pac. R. 111. The contract provides that Underwood was appointed agent of Moline Plow Company, who agreed to consign him certain goods. The agent was to settle for all goods received by him with farmers' notes taken for such goods as he should sell. The goods remaining unsold at the end of the season the agent should either settle for with farmers' notes, or store for the principal, at the principal's option. A few months later the agent absconded. The principal, after investigation, attached the goods on hand as the goods of the agent. Held, that he thereby elected to treat the goods as the agent's, and was bound by his election.

"Defendants cite cases supporting their contentions, and these we have examined and comment upon.

"Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 45 Am. St. R. 194, 37 N. E. R. 136. The P. Co. agreed to consign powder, paying freight, to H. & F., to sell as agents at prices not below those fixed by P Co., and to allow H. & F. for selling and guarantying sales a given per cent. H. & F. agreed to act as agents, to guaranty sales, to adhere to prices, to make no charge except commissions stated, to make report of all sales at end of each sixty days, and to pay for same with their sixty-day note. Court and counsel for all parties agreed that this contract created H. & F. agents until a sale took place. Then, the court held, H. & F. became ordinary debtors of the consignors for the amount due them for goods at catalogue price. This case cites the following as authorities sustaining a similar holding: Nutter v. Wheeler, Fed. Cas. No. 10,384; Ex parte White (1871), L. R. 6 Ch. App. 397; In re Linforth, Fed. Cas. No. 8,369.

"Ex parte White (1871), L. R. 6 Ch. App. 397. There was no written agreement between parties. The court found the course of dealing was substantially this: N. was to dispose of goods sent him by T. & Co.,

commissions, whether they sold or not, and discount was to be allowed for quick payment, as is usual in case of sales. The course of dealing shows that the proceeds of sale were not to

and was not to pay for them unless he disposed of them. He was to return at end of every month an account of sales actually made, and then, after lapse of another month, was to pay in cash for amount of goods which he so disposed of according to values fixed by price list sent him. It does not appear that he ever was expected to return any particular contract, or names of customers. He pursued his own course in dealing with goods, and frequently before sale manipulated them to a very considerable extent by pressing, dyeing, and otherwise altering their character, changing them as much as wheat would be changed by being turned into flour; and he sold them on what terms he pleased as to price and credit. T. & Co. undertook to impose a trust on certain funds alleged to have been collected by N. upon sales of their goods. The court held: 'The course of dealing between parties was inconsistent with the idea that N. was dealing in a fiduciary character in respect to these goods, or that the relation of vendor and purchaser existed between T. & Co. and parties to whom N. sold. The proceeds of sale were the moneys of N. Mellish, L. J., said: 'It appears to me that the real question is: When N. sold the goods, did he sell them as the agent of T. & Co., so as to make T. & Co. the vendors, and the persons to whom he sold purchasers from T. & Co., or did he sell on his own account, so as to create the relation of purchaser and vendor between himself and the persons to whom he sold? Now, it is said that he was a *del credere* agent; and no doubt it requires a very minute examination of the course of business to distinguish between a *del credere* agent and a person who is an agent up to a certain point,—that is to say, until he has sold the goods,—but who, when he has sold the goods, has purchased them on his own credit, and sold them again on his own account. . . . Now, if it had been his (N.'s) duty to sell to his customers at that price (the price fixed by T. & Co.), and to receive payment for them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent. But if the consignee is at liberty to sell at any price he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and time, in my opinion, whatever the parties may think, their relation is not that of principal and agent.' The alleged agent in such a case (as this) is making on his own account a contract of purchase with his alleged principal, and is again reselling.

"Nutter v. Wheeler (Dist. Ct. Mass., 1874), 2 Low. 346, Fed. Cas. No. 10,384. W. & Co., manufacturers of tools, were in the habit of sending their goods to G., at his shop in B., who sold them at such prices, to such persons, on such terms as he pleased. Whenever G. sold tools, he was to pay W. in thirty days prices shown by list, less agreed discount. W. had the right at any time to sell goods remaining in G.'s shop unsold, and G. was permitted to sell goods at factory of W., who then delivered

be kept separate, but Kirkpatrick & Co. remitted their check on general account, and it was accepted without question or comment. This was a virtual agreement that Kirkpatrick &

them, and charged G. the trade price, less agreed discount. Instead of paying in thirty days, G. sometimes gave his note for balance due, one of which W. held at time of G.'s bankruptcy. G. ordered three drills to be sent by W. to a customer. They were sent, and bill made out to G. as purchaser for trade price, less discount, and sent him in a letter, in which W. & Co. said they had taken off fifteen per cent., and hoped to get cash in thirty days. G. went into bankruptcy. The purchasers had not paid for drills, and W. & Co. collected price therefor. G.'s assignee brought this suit against them for money had and received. Lowell, J., said, among other things: 'It has been settled for a long time that upon the bankruptcy of a factor his principal may recover from the assignees any of the goods remaining unsold, or any proceeds of the sale of such goods which the assignees themselves have received, or which remain specially distinguishable from the mass of the bankrupt's property; . . . and it makes no difference that the factor acted under a *del credere* commission or sold the goods in his own name. As to those goods sent to Boston, he (G.) may be described as a bailee, having power to sell as principal. But after the goods were sold, the agreement appears to have been that G.'s credit alone was looked to.' Relying upon the authority of Ex parte White, 6 Ch. App. 397, the court finally said: 'If the relation of the parties was such as I have considered it, then, even as to the goods which had been once consigned to G., he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals."

"Ex parte Flannagans (Dist. Ct. Va., 1875), 2 Hughes, 264, 12 N. B. R. 230, Fed. Cas. No. 4,855. F. & Son, manufacturers, and R. & H., commission merchants, in 1873 agreed as follows: 'We, F. & Son, propose to give you entire agency for Stonewall fertilizer at Norfolk, and for . . ., on condition you push sale, and have proper man to look after it, and to allow you a commission of ten per cent. for sales and guaranty, we to draw on you at sight or short time for $30 a ton. The price to be sold at is $65 in Baltimore. For balance, after paying $30, you to give your acceptances, say, payable first December, 1873; accounts to be rendered and settlement after selling season is over; no charge to be made for storage during the season. Any guano left over and not sold is to be at the risk and on our account. We agree to furnish the guano delivered in Baltimore, one hundred tons to be delivered in . . ., and balance as ordered. . . . Will ship in lots to any point you may direct.' R. & H. accepted the above. The court held that under authority of Ex parte White (1871), L. R. 6 Ch. App.

Co. might use the proceeds as they chose, and account for them out of their general funds. These features are all evidences of a sale, and cover every risk, obligation and duty that rests upon a purchaser, and cover every right in handling the

397, and section 215, Story, Ag., consignments under above contract were sales, and not shipments under a *del credere* guaranty. The judge held R. & H. were primarily liable to F. & Son for a fixed price on their acceptances, and that they might sell to planters at a different price, and then stated that 'the now well-settled law of *del credere* guaranty is that the factor is not the primary debtor; that his engagement is merely to pay the debt if it is not punctually paid by the person to whom he sells, —citing Story, Ag., § 215,— and held that therefore R. & H. were not factors, but purchasers.

"In re Linforth (Cir. Ct. Cal., 1877), 4 Sawy. 370, Fed. Cas. No. 8,369. June 1, 1876, F. agreed to furnish L. such manufactured goods as he should order, to allow L. certain specified discounts from price lists, and to give L. exclusive sale of such goods. L. agreed to pay freight charges, etc., on goods shipped, to insure at his own cost for benefit of F., to render account of sales every three months, and to settle for all goods sold or shipped from his (L.'s) warehouse by giving his note, payable in sixty days from date fixed for rendering account of sales as provided. L. further agreed to settle for such goods as might be on hand June 1, 1877, by giving notes, payable in six months, if so required by F. F. agreed to allow additional discount for all cash paid in advance of times specified. The court held that transactions under this contract were sales on a credit; citing Nutter v. Wheeler and Ex parte White, *supra*.

"Gindre v. Kean (1894), 31 Abb. N. C. 100, 7 Misc. R. 582, 28 N. Y. Supp. 7. The suit arose out of an effort by principals to recover of the assignee in insolvency of their *del credere* agent the amounts due for goods furnished him and which he had sold. The principle is tersely stated by Bischoff, J., at page 7. as follows: 'The principles which should control the decision of the case at bar, and which are to be deduced from the adjudged cases, are that whenever the agreement of the alleged principal and factor, whatever they may style themselves or their relation, and whether the agreement be express or only inferable from the course of business, clearly manifests an intention that the alleged factor shall become definitely and primarily liable upon a sale for the purchase price of the goods consigned, it is, in legal effect, a sale by the alleged principal to the alleged factor, out of which arises the ordinary relation of debtor and creditor. The liability of the alleged factor, under such an agreement, is repugnant to that of a mere agent, whose duty to remit is commensurate only with the amount of the money which he has actually received upon a sale for his principal's account.' The court cites the case of Linforth, Nutter v. Wheeler, and Ex parte White with approval."

In Arbuckle Bros. v. Gates (1898), 95 Va. 802, 30 S. E. R. 496, the same

goods that an owner could have, except, simply, the price was to be sustained. This was evidently provided in order to keep the price uniform in all markets and stifle competition. Kirkpatrick & Co. could sell in any territory, in any amount, to

contract came before the court, in Virginia, for construction, and the same conclusion was reached. The court, referring to certain further cases, said:

"In Williams v. Tobacco Co. (Tex. Civ. App.) 44 S. W. R. 185, an agreement, which was very similar in its essential features and provisions to that under consideration, was construed by the court of civil appeals of Texas. The agreement purported that the Drummond Tobacco Company appointed A. H. Schluter & Co. as agents to sell its tobacco at such prices as the company should from time to time prescribe, and that the title to the tobacco should remain in the tobacco company until sold by the said agents. The latter were to receive a commission for selling, and, in consideration thereof, warranted that every shipment made to them should be paid in full. The company, in shipping the tobacco, invoiced it to A. H. Schluter & Co. as agents, and used a billhead that designated the shipment as a 'consignment.' It was shown that, after the shipment of each bill of tobacco, the company would draw an acceptance of the same date as the invoice of the tobacco for the amount of the bill, less the commission, payable sixty days after date, which Schluter & Co. would accept, and the company at the maturity thereof would present for payment, and Schluter & Co. would pay, whether they had sold the tobacco or not. The court decided that the transaction was a sale, and did not create an agency.

"In Mack v. Tobacco Co., 48 Neb. 397, 58 Am. St. R. 691, 67 N. W. R. 174, a contract, similar in its terms to the one construed in the above-cited case from the Texas court, was held by the supreme court of Nebraska to be a sale, and not an agency. . . .

"Similar contracts were construed in the following cases to constitute a sale, and not an agency: In re Linforth, 4 Sawy. 370, Fed. Cas. No. 8,369; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. R. 309, 22 N. E. R. 542; Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. R. 136; Aspinwall Manufacturing Co. v. Johnson, 97 Mich. 531, 56 N. W. R. 932; Braunn v. Keally, 146 Pa. St. 519, 23 Atl. R. 389, 28 Am. St. R. 811; Kellam v. Brown, 112 N. C. 451, 17 S. E. R. 416. . . .

"In Conable v. Lynch, 45 Iowa, 84, Berry agreed to sell machines for Conable to such persons only as were perfectly responsible, take notes for the deferred payments, indorse them and guaranty their payment. He was to send to Conable the notes of purchasers as he sold the machines, and to remit promptly the proceeds of all cash sales, less the amount of his commissions. All the machines, until paid for, were to remain the property of Conable, and at the expiration of the contract Berry was to pay for all machines not sold. The court held that the effect of the contract was to make Berry the agent of Conable until the termination of the contract, but after that time it was a conditional sale.

"It thus appears that, until the ex-

any purchaser, on any terms, for cash or credit, take notes or make accounts, and dispose of the goods as absolutely and free of limitation as any owner could, except they could not vary the price."

§ 50. How question determined—Law or fact.—Where the contract is in writing or the facts are not disputed, the question whether the writing produced or the facts admitted operate to create a sale or an agency to sell is one of law to be decided by the court; but when the facts are controverted it becomes a question for the jury, under proper instructions from

piration of the contract, the relation of creditor and debtor did not arise. Until then Berry sold the machines for and on account of Conable, and the relation between them was that of principal and agent, but when the contract expired by limitation, and Berry came under the obligation to pay for all unsold machines, the court held that the contract made the transaction a conditional sale.

"In Bayliss v. Davis, 47 Iowa, 340, Bayliss, under the agreement there construed, appointed one Stinson his agent to sell harvesters, and agreed to allow him a commission of $40 on each harvester. Stinson agreed to advance one-third of the price, and give his notes for the residue, and to sell on the same terms. All notes taken for machines sold by him were to be made payable to Bayliss, the proceeds of sale were to be remitted by him to Bayliss as fast as received, after deducting his advances, and his own notes were to be taken up by exchanging for them the notes of farmers to whom he had sold machines. It was said by the court that, while the advance of money and giving notes would ordinarily, without explanation, indicate a sale, yet when considered in connection with the fact that Berry was to be repaid his advances from the cash payments made by farmers to whom he sold machines, and that his own notes were to be taken up and paid by their notes, it was not inconsistent with the agency which was set out in other parts of the contract."

The same conclusion was also reached on the same contract in Snelling v. Arbuckle (1898), 104 Ga. 362, 30 S. E. R. 863. See also Howell v. Boudar (1898), 95 Va. 815, 30 S. E. R. 1007. The question is also very fully discussed in Norwegian Plow Co. v. Clark (1897), 102 Iowa, 31, 70 N. W. R. 808. For still other cases holding particular contracts to be contracts of sale rather than of agency, see Alpha Check-Rower Co. v. Bradley (1898), 105 Iowa, 537, 75 N. W. R. 369; Armstrong v. St. Paul, etc. Co. (1891), 48 Minn. 113, 49 N. W. R. 233; Granite Roofing Co. v. Casler (1890), 82 Mich. 466, 46 N. W. R. 728; Bradley Mfg. Co. v. Raynor (1896), 70 Ill. App. 639; Peoria Mfg. Co. v. Lyons (1894), 153 Ill. 427, 38 N. E. R. 661; Yoder v. Haworth (1898), 57 Neb. 150, 77 N. W. R. 377; Hutton v. Lippert (1883), 8 App. Cas. 309; Whitman Agricultural Co. v. Hornbrook (1899), 24 Ind. App. 255, 55 N. E. R. 502.

the court, to determine, in view of all the circumstances, what the contract was, and what, in accordance with the instructions, was its legal effect.[1]

[1] Thus in Rauber v. Sundback (1890), 1 S. D. 268, 46 N. W. R. 927, the court said: "Upon the whole it seems to us very plain that the real intent and understanding of the parties to this agreement must be gathered from a variety of sources: some affording direct and definite evidence; others indirect, indefinite and possibly inconsistent and confusing. It must be determined to some extent, at least, from statements and expressions, the meaning of which seems doubtful and obscure. These expressions must be analyzed and compared, not only with each other, but with other statements as to the agreement, if there are any, which are more definite and certain. By this means only could the final fact as to what agreement these parties made — its scope and meaning — be intelligently determined. This being our conclusion as to the condition of the evidence, it follows that in our judgment the question should have been submitted to the jury, with a plain instruction from the court as to what agreement would constitute the transaction a bailment, and what a sale. Of the cases cited in respondent's brief, Fish v. Benedict, 74 N. Y. 613; Bastress v. Chickering, 18 Ill. App. 198 [affirmed 130 Ill. 206, 17 Am. St. R. 309]; and Jenkins v. Eichelberger, 4 Watts, 121, 28 Am. Dec. 691,—are inapplicable to this case, so far as the distinct question now presented is concerned, because in each of those cases the agreement upon which the rights of the parties depended was in writing, and there was and could be no doubt or question as to its terms, and it was plainly the duty of the court to construe it, and declare whether it constituted the transaction a sale or a bailment. But here the very matter in doubt and dispute is, What did the parties agree to? and to find and determine what that agreement really was, its terms and extent, was a question of fact for the jury, on all the evidence: its force and legal effect a matter of law for the court. The other cases cited by respondent were where grain had been deposited with a warehouseman, and the question there, as here, was: Was it a sale or a bailment? But in those cases the undisputed testimony showed, and it was not questioned, but conceded, that the agreement never contemplated that the specific article which was the subject of the agreement should be retained by the bailee, or purchaser, or that such specific grain should be returned in case of demand, but that other grain of the same kind and quality might be returned in its place. Thus the very fact which, in the opinion of the court, tested and determined the character of the transaction, was not in doubt or dispute. In these cases, as in those just previously noticed, the terms of the agreement were definite, clear and unambiguous, and that is the marked and significant distinction between those cases and the one at bar. We think the case, with proper instructions from the court as to what constituted a sale, and what a bailment, should have been submitted to the jury."

For this purpose a full disclosure of the circumstances is admissible,[1] and in ambiguous cases parol evidence may be resorted to in order to show the intention.[2]

§ 51. Consignment of goods in payment of debt or to cover prior advances.— Goods may, of course, be delivered in payment of a debt due from the consignor to the consignee, or to cover prior advances made by the latter to the former. Where

[1] Simpson v. Pegram (1891), 108 N. C. 407, 13 S. E. R. 7. (The statements upon the consignee's printed letter-heads, for example.)

[2] Head v. Miller (1891), 45 Minn. 446, 48 N. W. R. 192. In this case, after some oral negotiations, a memorandum or order was signed by one party in the following form:

"Order No. ——, February 11th, 1889.

"Send to J. A. Bixby & Co.

"Place, Minneapolis, Minn.

"How ship, ——.

"Terms, 4 mos. from July 1st list.

"13 No. 24 steel furnaces $100.

"12 No. 034 " " $125.

"2 No. 55 furnaces with dia.

"2 No. 35 " " "

—at 60 and 10 per cent. from list delivered in Minneapolis. It is agreed that Head's Iron Foundry will carry over to next season any furnaces not sold on January 1st, 1890.

[Signed] "J. A. BIXBY & Co."

The controversy was between the foundry company and a receiver of the property of Bixby & Co., the former seeking to recover furnaces in the possession of the latter, not sold by Bixby & Co. Said the court: "This memorandum, treated as an order, is not directed to any one, and is incomplete in itself; that is to say, it must be construed in connection with the proposition or offer of the plaintiffs. It does not follow that the terms of the agreement actually expressed in the memorandum may be contradicted or disputed by parol; but the memorandum is consistent with a consignment of the goods, as claimed by the plaintiffs, or a sale, as insisted on by the defendant. The prices or terms specified in the memorandum may apply to either. Pam v. Vilmar, 54 How. Pr. 235. We think the evidence sufficient to support the finding of the trial court that the goods were taken on consignment, and the status of that portion thereof remaining unsold on January 1, 1890, is defined in the memorandum; that is to say, as against Bixby and the receiver, the property in question, when this suit was brought, was, by the mutual understanding of the parties, 'carried' by Head's Iron Foundry, which is shown to be the plaintiffs. It was held by Bixby & Co. as bailees, at the risk of the plaintiffs. For this Bixby & Co. had taken pains to stipulate, and it is entirely in harmony with the plaintiff's alleged claim and the finding of the court that the goods were shipped to them to be sold by them for the plaintiffs, and what they could not sell by January 1st the plaintiffs were to hold, and Bixby & Co. were not responsible for, except as bailees."

the goods have been actually received by the consignee, no question will ordinarily arise, and the transaction will be deemed a sale, or, in the case of a factor, the subjecting of the goods to the operation of his lien.[1] But where the goods have been sent forward, and while in transit are intercepted by the creditors of one party or are overtaken by accident, the question of the effect of the transaction presents difficulties. Upon this question the authorities are in conflict,[2] certain of the cases holding that the goods do not become subject to the claim of the consignee until they actually come into his possession;[3] others assert the doctrine that where advances have been previously made in reliance upon a promise to subsequently consign goods, a delivery to the carrier, consigned to the party, is sufficient,[4] while others hold that, in addition to such a delivery, it is necessary that the advances should have been made in reliance upon this particular consignment.[5] In a recent case, in which the authorities are reviewed, the court say: "The rule seems to be that, in order to change the title to the property shipped and vest it in the consignee, there must be a bill of lading, receipt, or letter of information forwarded to the consignee, or that the advancements were made upon the faith of the particular consignment." [6]

§ 52. Sale to be distinguished from contract for work and labor.— Sale, still further, is to be distinguished from a contract for the performance of work and labor. This distinction becomes important most frequently in cases affected by the statute of frauds, and will be separately considered in that con-

[1] See Mechem on Agency, § 1035.

[2] See Mechem on Agency, § 1035.

[3] Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Oliver v. Moore, 12 id. 482; Woodruff v. Railroad Co., 2 Head (Tenn.), 87. See Halliday v. Hamilton, 11 Wall. (U. S.) 564.

[4] Elliott v. Cox, 48 Ga. 39; Hardeman v. De Vaughn. 49 Ga. 596; Wade v. Hamilton, 30 Ga. 450; Nelson v. Railroad Co., 2 Ill. App. 180.

[5] Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Vallé v. Cerré, 36 Mo. 575, 88 Am. Dec. 161; Desha v. Pope, 6 Ala. 690, 41 Am. Dec. 76; Hodges v. Kimball, 49 Iowa, 577, 31 Am. R. 159; Elliott v. Bradley, 23 Vt. 217.

[6] First Nat. Bank v. McAndrews, 5 Mont. 325, 51 Am. R. 51.

nection; but it may and does arise in cases to which that statute does not apply. The rules of construction must be substantially the same in both classes of cases, though, perhaps, rather more technical tests have been applied in those cases which are affected by the statute.

Where the statute of frauds is not concerned, the question may become important as a matter of pleading, as a matter of damages, or as a matter of liability for loss where the loss must follow the title. The question here, as in the many other cases already considered, is not a matter of names, but of essence and intent, involving an investigation into the real situation and purpose of the parties, as well as an inquiry as to the form of the contract they have made.

Thus in a recent case in Wisconsin,[1] it appeared that the plaintiff had agreed to manufacture a large quantity of engravings and lithographs for theatrical purposes, for the defendant for his special use, to be taken and paid for during the theatrical season of 1885–86, and all of the work to be completed ready for delivery by December 15, 1885. A large part of the goods was taken and paid for during the season, and the balance was ready for delivery at the time agreed upon, but not being called for or paid for was destroyed by fire on May 26, 1886, while piled up and set apart for the defendant on the plaintiff's premises. The plaintiff had had these goods insured and had received a portion of the insurance money. He sued to recover the price of the goods remaining unpaid for.

Said the court, per Orton, J.: "The learned counsel on both sides, and the court below, treated this transaction as a sale of personal property. It was not a sale. When the contracts were entered into there was nothing *in solido* to be the subject of a sale. The mere paper, as the basis of this valuable work of mechanical art, was not only of insignificant value, but was not the subject of sale. The defendant did not wish to buy blank paper, and the plaintiff had none to sell. The plaintiff

[1] Central Lithographing & Eng. Co. v. Moore (1889), 75 Wis. 170, 43 N. W. R. 1124, 6 L. R. A. 788, 17 Am. St. R. 186. See also Patrick v. Colorado Smelting Co. (1894), 20 Colo. 268, 38 Pac. R. 236.

was to manufacture these engravings and lithographs for the especial, peculiar and exclusive use of the defendant in his business as a theatrical manager. They were advertisements adapted to the names and characters of his theatrical performances. It was the plaintiff's work of skill that gave the property produced by it any value. It was work and labor performed according to the order and direction of the defendant, and according to the terms of the contracts. When the required works were produced and ready to be taken away by the defendant and paid for, it was then not a sale. The plaintiff did not own them, and did not wish to own them, for they were of no use or value whatever to him, and were only of use and value to the defendant. When the job was completed according to the contracts, then the defendant was under legal obligation to take them away, and pay the amount agreed upon."

Further illustration of this question will not be attempted here, as it will be dealt with so frequently under various aspects hereafter; enough has been given to indicate the point of differentiation in this place material.

§ 53. Sale to be distinguished from compromise respecting conflicting liens.— Again, a sale is to be distinguished from a compromise respecting conflicting claims or liens, and the release thereof by one party to, or for the benefit of, the other. Thus, in one case it appeared that separate judgment creditors had caused executions to be levied upon the same property, each claiming priority, and that they had afterwards mutually agreed to release their liens, permit one to make a new levy, and sell for the benefit of both. After such sale, the creditor making it refused to recognize that the other had any right to share in the proceeds, and the latter brought an action to recover. The defense, among other things, was that the release was a *sale*, and therefore void under the statute of frauds because it was not evidenced by writing, but the court held that it was not a sale, but "a compromise of conflicting claims."[1]

[1] Mygatt v. Tarbell (1890), 78 Wis. 351, 47 N. W. R. 618.

§ 54. Furnishing of food by restaurant or innkeeper as sale.— Whether the supplying of articles, by restaurant and innkeepers, to their guests and patrons, to be consumed on the premises, as food, constitutes a "sale" of those articles within the meaning of statutes forbidding, for example, the sale of oleomargarine or intoxicating liquors, is a question which has been much discussed in recent cases, and perhaps deserves attention in this chapter. While some difference of opinion has existed, the authorities[1] are, in the main, agreed that, where the

[1] In Commonwealth v. Miller (1890), 131 Pa. St. 118, 18 Atl. R. 938, the defendant was owner and proprietor of a restaurant in Pittsburgh, and furnished meals to transient and regular patrons who paid for the same daily and upon the completion of each meal. On a certain day two men called at the restaurant, asked for a meal, and were at once furnished with it. Among the articles of food was a small dish of what appeared to be butter, but which was in fact oleomargarine. At the completion of the meal the same was paid for, and the oleomargarine taken away by the two men. Suit was brought against the proprietor of the restaurant for the recovery of the statutory penalty imposed upon "every person . . . who shall manufacture, sell, or offer, or expose for sale, or have in his . . . possession with intent to sell" oleomargarine. The court held the transaction to be a sale, though from that opinion the chief justice dissented. In their opinion, delivered by Clark, J., the court said: "That the food furnished to McRay and Spence, or so much of it as they saw fit to appropriate, was sold to them, cannot be reasonably questioned; when it was set before them, it was theirs to all intents and purposes, to eat all, or a part, as they chose, subject only to the restaurateur's right to receive the price, which it is admitted was promptly paid. They might not eat all of the article set before them, but they had an undoubted right to do so; and even assuming that the meal is the portion of food taken, in the sense stated, the transaction must be regarded as a sale wholly within the meaning and purport of the statute. It is certain that the oleomargarine composed a part of the meal the price of which was paid, and was embraced in the transaction as an integral part thereof. If an unlicensed keeper of a restaurant may set before his guests a bottle of wine, or other intoxicating liquor, charging a regular price for the same, with other articles of food furnished, with liberty to take much or little of the liquor as the guest may choose, or, failing to drink it with his meal, permit him to take it away with him, then the liquor laws of the commonwealth are of no avail, and the license to sell liquor is wholly unnecessary. When the liquor is thus furnished and paid for, it is in legal effect a sale, for the very act has been done which it is the policy of the law to prevent, and which it characterizes as a crime, viz., furnishing intoxicating liquors at a price which is paid.

proprietor sets before his guest, at the latter's request, a number of articles as constituting a "meal," for which the guest is to pay, these articles are then the guest's "to all intents and purposes, to eat all or part, as he chooses, subject only to the

So, in this case, the oleomargarine was furnished to the person named as food, and the price was paid. As the learned judge of the court below well said, it was not given away, and the fact that it was not sold separately, but with other articles, for a gross sum, would not make it less a sale. It therefore comes within the letter of the law, and it is also within its spirit. If the use of such articles is injurious, it would seem to be especially within the spirit of the act to prohibit public caterers from selling them to their guests as part of an ordinary meal. Penal statutes are to be strictly construed, but both the letter and the spirit of the act of 1885 cover this case, and we think the judgment was properly entered."

Paxson, C. J., dissenting from the foregoing, said: "When the legislature used the word 'sale,' it is fair to assume that it was employed in the sense in which it is popularly understood. If it was the intention not only to prohibit sales of oleomargarine, but also its use as an article of food, or in the preparation of food, by proprietors of eating-houses, restaurants, and hotels, it was easy to have said so in express terms. As the act stands, there is nothing to warn this defendant that he violated it by placing oleomargarine on the table as an article of food.

"I am unable to see how the legal or popular meaning of the word 'sale' will support this judgment. A sale is the transfer of the title to property at an agreed price. Story on Sales, § 1; Creveling v. Wood, 95 Pa. St. 152. I find nothing in the facts, as set forth in the case stated, to justify the conclusion that there was a sale of the oleomargarine. The two individuals referred to entered the defendant's place of business, and ordered a meal. It was furnished, but oleomargarine formed no part of it. It is true, there was some of that article on the table. They might have partaken of it, but they did not. When they left they carried the oleomargarine away with them. This, in my opinion, they had no right to do. A guest at a hotel may satisfy his appetite when he goes to the table. He may partake of anything that is placed before him; but, after filling his stomach, he may not also fill his pockets, and carry away the food he cannot eat. This I understand to be the rule as applicable to hotels and eating-houses in this country, and if there is anything in this case to take it out of its operation it does not appear in the case stated. The illustration of the bottle of wine, referred to in the opinion of the court, does not appear to me a happy one. Surely, if a proprietor of a hotel places a bottle of wine before his guest, who does not partake thereof, it cannot be said that it is a sale of the wine, nor has the guest the right to carry it away. He might as well carry off the table furniture."

In Commonwealth v. Worcester (1879), 126 Mass. 256, the defendant sold meals in his dwelling-house.

restaurateur's right to receive the price;" and that if, among the articles so furnished, is the forbidden article, there is a "sale" of that so far as the restaurateur is concerned, even though it was not specially ordered, or was not separately priced, or was not eaten by the guest. *A fortiori*, within this view would there be a sale; if the article in question is expressly ordered and separately paid for.[1]

Whether, under like general circumstances, there would be a purchase by the guest, was not the subject of investigation in the cases cited, for in all of them the guest or patron was actively or passively assenting to the act. It would be clear, however, if the question became material, that the patron could not become a purchaser without his express or implied assent.

With these meals, and as a part thereof, were served wine, lager beer and other liquors. No bar was in the room, but upon the tables were placed bottles containing the liquors. When the guests got through they paid the defendant for the meal. The court said: "The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of the meal would be a purchase of the liquors." The defendant was therefore properly found guilty of keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors.

[1] In Commonwealth v. Vieth (1892), 155 Mass. 442, 29 N. E. R. 577, the complaint charged the defendant with selling milk below the required standard of quality. He was the keeper of a hotel, who purchased his milk from a regular dealer, and furnished it to his guests in the same condition in which he received it. The milk complained of was delivered to one Baldwin, upon his ordering a glass of milk from the waiter in the café, to be drunk upon the premises. It was held that the evidence tended to show a sale in the defendant's café of a glass of milk, apparently a transaction in itself, and clearly within the statute imposing a fine for the sale of milk not of the required standard of quality.

In Commonwealth v. Warren (1894), 160 Mass. 533, 36 N. E. R. 308, an employee of a milk inspector called at the defendant's public house and ordered a breakfast in the dining-room. He asked for a glass of milk with his breakfast, part of which he carried away and analyzed. Thirty-five cents was paid for the breakfast, and nothing for the milk as distinct from the breakfast. The court held that this was as much a sale of the milk as though a specific price had been put upon it, or it had been bought and paid for by itself.

§ 55. Supplying goods by several common owners to one of them — Social clubs — Intoxicating liquors. — The question whether the supplying of intoxicating liquors by social clubs to their members constitutes a sale within the meaning of the statutes prohibiting sales without a license, the keeping open of bars on Sunday, and the like, has also frequently arisen and given much difficulty in its determination. The question depends so largely upon the character of the club, the language of the statute, and circumstances of each case, that it cannot be exhaustively considered here. But in general it has been held by the English and several American courts that when the club is organized in good faith with a limited membership for other purposes than the mere supplying of liquors, and the liquors are supplied to members in accordance with the rules of the club and simply as a part of the general refreshments furnished by the club, there is no sale within the meaning of the statutes. It has been contended in these cases that as the liquors belonged to the club, and the member in obtaining them, though at a fixed price, was but exercising his rights as a member of the club in pursuance of the original contract of membership, there was no new contract of sale between the club of which he was thus a member as seller and himself as purchaser.[1] Many other American cases, however, have re-

[1] In Commonwealth v. Smith (1869), 102 Mass. 144, the defendant was agent of a club, bought liquors with the club's money, and furnished said liquor to the club members. The plan was for the members to advance money to the club and receive in return checks of the denomination of five cents, which were presented at the club bar and liquor given in exchange. *Held*, that these facts would not, as a matter of law, show a sale.

In Seim v. State (1880), 55 Md. 566, 39 Am. R. 419, the court held that where a *bona fide* social club was formed, in connection with which liquor was purchased with the club's funds and dispensed to its members, each paying a stipulated price for the liquor consumed, which money was used solely to keep up the stock and cover the expenses of serving, and was not taken with a view to profit, such a transaction did not violate the liquor law providing that no person should sell, dispose of, barter or (if a dealer) give away fermented liquors on Sunday.

Graff v. Evans (1882), 8 Q. B. Div. 373, is a well known case. A *bona fide* club, with limitations as to membership, entrance fees, trustees for the control of its property, and

pudiated this distinction, and held that, as it was optional with the member whether he would obtain the liquors or not, and

other characteristics common to so cial clubs, dispensed liquors to its members without a license, and the court held that this was not a "sale by retail" of such liquors within the meaning of the licensing act.

In Tennessee Club v. Dwyer (1883), 11 Lea (Tenn.), 452, 47 Am. R. 298, it was held that a club which maintained a library, gave musical entertainments, afforded meals to its members, and kept a small stock of liquors which were for the use of members and paid for as used, no profit being made, was not liable to pay a privilege tax as a retail liquor dealer.

In Commonwealth v. Pomphret (1884), 137 Mass. 564, 50 Am. R. 340, it was held that the steward of a club was not liable for keeping intoxicating liquors with intent to sell the same, where the club was limited in its membership, hired the steward, who was a member, to deliver liquors to the other members upon presentation of checks representing a certain sum, and the money received was used by the steward in buying liquors in the name of and for the benefit of the club.

In Commonwealth v. Ewig (1887), 145 Mass. 119, 13 N. E. R. 365, it was held that, under a state of facts showing a dispensing of liquors to members of a *bona fide* social club, there was no "sale" of intoxicating liquors. So in Barden v. Montana Club (1891), 10 Mont. 330, 25 Pac. R. 1042, 24 Am. St. R. 27, 11 L. R. A. 593, the court held that, under a state of facts showing a *bona fide* literary and social club, which furnished its members with liquors with no intent to evade the liquor laws and without profit to itself, there was no "dealing in" or "selling" at retail. Piedmont Club v. Commonwealth (1891), 87 Va. 541, 12 S. E. R. 963, under a similar state of facts, announced the same opinion.

In Columbia Club v. McMaster (1891), 35 S. C. 1, 14 S. E. R. 290, the court held that "the distribution of liquors by a *bona fide* club among its members is not a 'sale' within the inhibition of a liquor law, even though the person receiving the liquor gives money for it."

In State v. St. Louis Club (1894), 125 Mo. 308, 28 S. W. R. 604, 26 L. R. A. 573, the authorities were elaborately considered, and the court held that, where a *bona fide* social club, not incorporated for profit, sells liquor to a member, that does not constitute a sale within the inhibition of the liquor law.

In People v. Adelphi Club (1896), 149 N. Y. 5, 43 N. E. R. 410, 52 Am. St. R. 700, 31 L. R. A. 510, a *bona fide* club, with a limited membership, which maintained a library and reading rooms, and supplied its members with liquors with no purpose of making a profit therefrom, was held not to be within the contemplation of the statute requiring licenses for the selling of intoxicating liquors. The court said: "We think the transaction did not amount to a sale within the meaning of the statute. It was but a distribution among the members of the club of the property that belonged to them. The fact that a payment was made does not change the character of the act." See People v. Andrews, 115 N. Y. 427 (*infra*).

And in Klein v. Livingstone Club,

as he obtained them from the owner, the club, and paid therefor a price agreed upon, all of the elements of sale were present.[1]

But, on the other hand, all of the cases are practically agreed that where the "club" is but a mere subterfuge — a device for

(1896), 177 Pa. St. 224, 35 Atl. R. 606, 55 Am. St. R. 717, under a similar state of facts, the court announced the same opinion.

[1] In Marmont v. State (1874), 48 Ind. 21, there was a club formed for social and relief purposes, which met each Sunday. On Saturday of each week the treasurer, by order of the club, bought a keg of beer, which was carried to the place of meeting, and on Sunday the beer was drunk by the members, each one, upon receiving a glass of it, paying five cents to the treasurer, which money was put in the club's treasury. Held to be a violation of the law prohibiting sales of intoxicating liquors on Sunday.

In Martin v. State (1877), 59 Ala. 34, the agent of an incorporated club sold liquors to the members, no license having been taken out. It was held that the ownership of the liquors changed so as to constitute a sale, passing from the corporation aggregate to the individual members, for a valuable consideration.

In Chesapeake Club v. State (1885), 63 Md. 446, the court was construing not the general Sunday liquor law, which was passed upon in Seim v. State (*supra*), but the local-option act, and it held that under this act, providing "that no person or persons, company, corporation or association shall deposit or have in his, her, their or its possession . . . any intoxicating liquors . . . with intent to sell or give away the same in violation of law, or with intent that the same shall be sold or given away by another person," shall be liable, the furnishing of liquors on Sunday by an incorporated club to its members was an act in violation of law.

In State v. Lockyear (1886), 95 N. C. 633, 59 Am. R. 287, the court held that the dispensing of liquors for the convenience of members by an ordinary social club was "in the strict legal sense" a sale. In State v. Horacek (1889), 41 Kan. 87, 21 Pac. R. 204, 3 L. R. A. 687, it was held that when an incorporated association purchased beer and brought it into Kansas, and furnished it to its members in exchange for chips purchased from the association, there was a violation of the law against selling intoxicating liquors. And in People v. Soule (1889), 74 Mich. 250, 41 N. W. R. 908, 2 L. R. A. 494, the court held that a club properly organized for social purposes could not distribute liquors among its members, receiving pay therefor as distributed, which went into the club treasury to replenish stock and pay expenses, without being liable to pay a retail tax for selling such liquors.

So in Newark v. Essex Club (1890), 53 N. J. L. 99, 20 Atl. R. 769, the furnishing liquors to club members, where the club made no profit and there was no purpose to evade the law, was held to constitute a sale of liquor by the club. State v. Easton Club (1890), 73 Md. 97, 20 Atl. R. 783, 10 L. R. A. 64, was a case similar to Chesapeake Club v. State, and the

avoiding the operation of the statute — it furnishes no protection, and that its supplying of liquors to its so-called members constitutes a sale within the prohibition of the acts.[1]

court came to the same decision, construing the same local-option act.

In Kentucky Club v. Louisville (1891), 92 Ky. 309, 17 S. W. R. 743, the court held that a city ordinance laying a tax on every club house where intoxicating liquors were sold by retail applied to a club which, under the ordinary arrangements, dispensed liquors to its members only.

In Nogales Club v. State (1891), 69 Miss. 218, 10 S. R. 574, it was held that where a social club had a back room partly disconnected from the other rooms, in which it disposed of liquors, at prices regulated by the club, to members and visitors, employing a steward for the purpose at a fixed salary, it was within a statute prohibiting sales of intoxicating liquors to minors.

In State v. Neis (1891), 108 N. C. 787, 13 S. E. R. 225, 12 L. R. A. 412, a number of persons, members of a club, were owners in common of a jug of liquor, which they put in the hands of a steward, and each time one of them took a drink from the jug he gave the steward ten cents, the money to be used in replenishing the jug. *Held*, that this constituted a sale. So in State v. Boston Club (1893), 45 La. Ann. 585, 12 S. R. 895, the court held that when a social club distributed liquor to its members the transaction was a sale, saying that, "whether incorporated or not, in both cases the property passes to the individual member and the money paid becomes the property of the club."

In Krnavek v. State (1897), 38 Tex. Crim. R. 44, 41 S. W. R. 612, the case concerned a *bona fide* club, and the court said: "The question here is whether the sale of intoxicants by the managing steward or barkeeper of the club to one of the members of said club is a sale. We are of opinion that it is."

In Mohrman v. State (1898), 105 Ga. 709, 32 S. E. R. 143, 43 L. R. A. 398, the indictment was against the manager of a social club for "keeping open a tippling-house on the Sabbath day." The determination of the question whether there had been a sale of liquor was not necessary under the indictment, but the court discussed the point and approved those authorities which hold that for a club to distribute liquors among its members is a sale.

[1] In State v. Mercer (1871), 32 Iowa, 405, a so-called "social club" was formed whose sole object appeared to be to supply its members with liquors in contravention of the law. The members were given tickets in exchange for money paid, and these tickets were taken in payment for liquors. It was held that the sale of the tickets was in fact the sale of the liquors, and the defendant was guilty of a violation of the law.

In Rickart v. People (1875), 79 Ill. 85, an association was formed for the avowed purpose of promoting temperance and friendship. One of the members, who was made treasurer, ran a dram-shop, and the other members, upon payment of a dollar each, received tickets representing the amount paid, which were presented at the dram-shop and honored in pay-

§ 56. Transfer of title by operation of law.— Finally, to be distinguished from the transfers to be considered in the present treatise are those which result from operation of law. For example, "a recovery for the conversion or for the taking of a specific chattel, and satisfaction of the judgment, changes the property in a chattel by operation of law, on the principle that *solutio pretii emptionis loco habetur;* where the transfer, by such means, is considered as a complete and absolute change of title." [1]

Such cases, clearly, do not depend upon the mutual negotiation and agreement of the parties, and are foreign to the present subject.

ment for liquors or cigars. The treasurer received all the money and rendered no account. *Held*, that such dispensing of liquors without a license was a violation of the law against the sale of intoxicating liquors.

People v. Andrews (1889), 115 N. Y. 427, 22 N. E. R. 358, 6 L. R. A. 128, has been a much misunderstood case. It was long thought that it held the distributing of liquors by *bona fide* social clubs to their members to be sales within the meaning of the liquor laws, and several cases were decided by the general terms in harmony with that view. But in People v. Adelphi Club, *supra*, the court of appeals declared that such was not the meaning of this case. The facts showed a fraudulent attempt to evade the laws under the guise of a club, any one being admitted to membership on payment of a nominal fee, which was returned to him upon withdrawal. It was this feature which controlled the decision, and its application is confined to such cases of fraud.

[1] Thayer v. Manley (1878), 73 N. Y. 305, 309. See also Cooper v. Shepherd (1846), 3 Com. B. 266, 54 Eng. Com. L. 265; Lovejoy v. Murray (1865), 3 Wall. (U. S.) 1; Fox v. Prickett (1869), 34 N. J. L. 13; Miller v. Hyde (1894), 161 Mass. 472, 37 N. E. R. 760, 42 Am. St. R. 424, and note at p. 433, where the mooted question, whether it is the judgment or its satisfaction which transfers the title, is discussed.

CHAPTER III.

OF THE CAPACITY OF PARTIES—WHO MAY BUY AND SELL.

§ 57. Purpose of this chapter.

I. Of Capacity in General.

58. General rule as to competency.
59. Presumption of competency.
60. Causes and classification of incompetency.

1. *Natural Incompetency.*

61. What here included.

a. Persons of Unsound Mind.

62. Scope of present treatment.
63. Insane persons as parties to contracts generally.
64. Degree of incapacity which avoids.
65. Weakness of mind and imposition combined.
66. Mere inadequacy of price.
67. Partial insanity — Monomania — Sane interval.
68. —— Presumption as to sane intervals.
69. Effect of judicial determination of insanity.
70. —— Only *prima facie* evidence as to period covered.
71. —— Petitioner for proceeding not estopped by it.
72. Whether contracts of insane person void or voidable.
73. Avoiding contract—Executed and executory.
74, 75. —— Protection of innocent party.
76. —— Insane person must have received benefit.
§ 77. —— Return of consideration necessary.
78, 79. —— Right to recover from *bona fide* purchaser.
80. Who may disaffirm.
81. —— Creditor may not.
82. —— Sane party may not.
83. Affirmance of contract.
84. Contract of insane person for necessaries, binding.
85. —— Liability limited to value received.

b. Incompetency of Drunkards.

86. Contracts of drunken persons.
87. —— Voidable, not void.
88. —— *Bona fide* holders.
89. Habitual drunkards.
90. Partial intoxication coupled with fraud.
91. Drunkards under guardianship.

c. Incompetency of Spendthrifts.

92. Contracts of spendthrifts, etc.

2. *Legal Incompetency.*

93. In general.

a. Incapacity of Infants.

94. In general.
95. Infant's contracts voidable, not void.
96. —— What meant by voidable.
97. —— Who may avoid.
98. —— When avoided.
99. —— When ratified.
100. —— How much to be ratified.

§ 101. —— Effect of ratification.
102. —— Knowledge of non-liability.
103. —— Consideration for ratification.
104, 105. —— Ratification, how effected.
106. Sale or exchange by infant voidable.
107. —— When avoided.
108. —— How avoided.
109. —— Return of consideration.
110. —— *Bona fide* purchasers.
111. Chattel mortgage voidable.
112. —— When avoided.
113. —— Returning consideration.
114. —— How avoided.
115. Purchases voidable, if not necessaries.
116. —— When avoided.
117. —— How avoided.
118. —— Return of consideration.
119. —— Ineffectual defenses—Recoupment—Injury to goods.
120. —— Effect of disaffirmance—Revests seller's title.
121. —— Ratification of purchases.
122. Liability of infant for necessaries.
123, 124. —— For what amount bound.
125. —— Interest.
126. —— Goods must have been furnished on infant's account.
127. —— Infant not liable if already supplied.
128. —— Seller supplies goods at his peril.
129. —— Infant living with parents, etc., presumed to be supplied.
130. What constitute necessaries.
131. —— How determined—Burden of proof.
132. —— Illustrations.

b. Incapacity of Married Women.

§ 133. What here considered.
134. Common-law disability.
135. Equitable doctrines as to separate estate.
136. Statutes removing disability.
137. —— To what extent.
138. —— What contracts she may make.
139. —— Statutory liability for family necessaries.

c. Capacity of Corporations.

140. In general.
141. Corporations as sellers.
142. Corporations as buyers.

d. Capacity of Partnerships.

143. In general.
144. Partnerships as sellers.
145. Partnerships as buyers.

II. Sales by Persons Having Only a Defeasible Title.

146. Such a person in possession may pass good title to *bona fide* purchaser.
147. —— One holding subject to secret lien.
148. —— Fraudulent vendee.
149. —— One who obtained goods by trick.
150. —— Fraudulent grantee of debtor.
151. —— Fraudulent debtor.
152. —— Conditional vendee.
153. —— Purchaser for cash who has not paid.

III. Sales by Persons Having Only an Ostensible Title.

154, 155. In general, one cannot convey better title than he has.
156. Possession alone insufficient evidence of title.

§ 157. Possession coupled with *indicia* of ownership.
158, 159. —— What requisite.
160–164. —— Illustrations.
165. —— Limitations.
166. Appearance of title from possession of bill of lading or warehouse receipt.
167. Ostensible title of vendor in possession.
168, 169. Ostensible title under Factors Acts.
170. Ostensible title by conduct.

IV. Sales and Purchases by Persons Acting for Others.

171. In general.
172. Nature of authority.

2. *Authority to Sell Personal Property.*

173. How considered.

a. Authority to Sell Conferred by Law.

174. Chief illustrations.

b. Authority Conferred by Act of Party.

175. Express authority to sell.
176. Implied authority to sell.
177. —— None implied from mere possession.
178. None implied from mere relationship — Husband and wife — Parent and child.
179. None implied from authority to do other kinds of acts.

3. *Authority to Buy Personal Property.*

180. How considered.

a. Authority to Buy Conferred by Law.

§ 181. Chief instances.
182. Authority of wife to buy necessaries on husband's credit.
183. —— Where parties are living together.
184. —— Where parties are living apart.
185. —— What constitute necessaries.
186. Authority of infant child to buy necessaries on parent's credit.

b. Authority to Buy Conferred by Act of Party.

187. Express authority to buy.
188. Implied authority to buy.
189. —— Not implied from mere relationship of parties.

V. Sales by Persons Acting in an Official Capacity.

190. In general.
191. Authority must be strictly construed.
192. Officer must keep within the term and territory of his office.
193. Officer cannot deal with himself.
194. Purchasers at execution, tax, and similar sales.
195. Purchases at executors', administrators' and guardians' sales.
196. Trustees' sales.

§ 57. **Purpose of this chapter.**— Having now considered the questions arising out of the definition and differentiation of the contract of sale, attention will next be given to the question of who may sell or buy. This primarily leads to the dis-

cussion of the capacity of parties, in general, to enter into the contract of sale; but, for convenience sake, a wider range will be given to the present chapter so as to include certain allied matters which fall, perhaps, as logically under this head as under any other, and there will be considered here the questions —

I. Of sales and purchases by parties acting in their own right; and herein of capacity in general.
II. Of sales by persons having only a defeasible title.
III. Of sales by persons having only an ostensible title.
IV. Of sales and purchases by persons acting only in a representative capacity, or sales and purchases by agents.
V. Of sales by persons acting in an official capacity.

I.

Of Capacity of Parties in General.

§ 58. **General rule as to competency.**— Sale being a transfer of title in pursuance of a contract, it follows that, as a rule, the same capacity is requisite for the making of a contract of sale as for the making of any other contract; or, stated affirmatively, that any person who is capable of making contracts generally is competent to enter into the contract of sale.

§ 59. **Presumption of competency.**— The law does not presume that the parties to a contract were incompetent. On the contrary, the presumption is that they were competent, and the burden of proving incompetency rests upon him who alleges it. At the same time —

§ 60. **Causes and classification of incompetency.**— There are many persons who are, either generally or in special cases, incompetent to contract, and this incompetency requires consideration. Incompetency may arise either from infirmity of the mind or it may be created by law. The former kind is often termed *natural* incompetency, while the latter is designated *legal* incompetency. Of the first kind are the defects

of idiots, insane persons and drunken persons; and of the latter kind is the incompetency of aliens, infants and married women.

1. *Natural Incompetency.*

§ 61. **What here included.**— As suggested in the preceding section, there will be included under this head the question of the incompetency of the insane person, the drunkard, and the spendthrift; and these subjects will be considered in the order named.

a. Incompetency by Reason of Mental Unsoundness or Weakness.

§ 62. **Scope of present treatment.**— It is not the purpose here to enter minutely into the consideration of the question of the capacity of insane persons to make contracts generally, as that subject belongs more appropriately to works upon the law of contracts; but a brief reference to some of the leading principles and to certain of the more important cases may be of service. In what will be said, no attempt will be made to distinguish between the various forms of mental disease which are sometimes classified as idiocy, delirium, lunacy, mania, and the like.

§ 63. **Insane persons as parties to contracts generally.**— Mental incapacity may arise from a great variety of causes and present almost numberless degrees of completeness. It may be the result of inheritance, illness, accident or intemperance, and may be general in its nature, though limited in its degree, or it may be complete as to some subjects or on some occasions, while not existing at other times or in reference to other matters. Hence —

§ 64. **Degree of incapacity which avoids contracts.**— It is not every degree of mental weakness which incapacitates one for entering into contracts, but it must be of such a degree that the person is unable to intelligently comprehend the act to

which the contract relates, or to intelligently will to do such act.[1]

In the absence of fraud or imposition, therefore, mere weakness of intellect,[2] old age,[3] "vacillation, shiftlessness, improvidence, occasional despondency or religious hobby,"[4] physical weakness, or want of judgment and discretion,[5] is not enough, but the disability must be so great that the person is "wholly, absolutely and completely unable to understand or comprehend the nature of the transaction."[6]

§ 65. Weakness of mind and imposition combining.—But though the weakness of mind or partial defect be not sufficient to incapacitate, yet if there be evidence of co-existing fraud, undue advantage or imposition operating upon such weakened or defective intellect, the two combining may be enough to invalidate the dealing.[7]

The rules upon this subject have been well stated in one case[8] as follows: "Mere weakness of intellect, if the party is *compos mentis*, does not deprive him of the capacity to contract; but imbecility of understanding constitutes a material ingredient in examining whether a bond or other contract has been obtained by fraud or imposition or undue influence; for although a contract made by a man of fair understanding may

[1] Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Jackson v. King, 4 Cow. (N. Y.) 218, 15 Am. Dec. 354; Sands v. Potter, 165 Ill. 397, 46 N. E. R. 282.

[2] Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; Smith v. Beatty, 2 Ired. (N. C.) Eq. 456, 40 Am. Dec. 435; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353; Harrison v. Otley, 101 Iowa, 652, 70 N. W. R. 724; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. R. 264.

[3] Smith v. Beatty, *supra;* Aldrich v. Bailey, *supra.*

[4] West v. Russell, 48 Mich. 74. Belief in spiritualism does not of itself show insanity unless it amounts to a mania. Connor v. Stanley, 72 Cal. 556, 1 Am. St. R. 84.

[5] Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

[6] Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. R. 264.

[7] Garrow v. Brown, Winston's Eq. (N. C.) 46, 86 Am. Dec. 450; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353; Seeley v. Price, 14 Mich. 541; Darnell v. Rowland, 30 Ind. 342; Henry v. Ritenour, 31 Ind. 136; Yount v. Yount, 144 Ind. 133, 43 N. E. R. 136.

[8] Juzan v. Toulmin, *supra.*

not be set aside, merely because it was a rash, improvident or hard bargain, yet if made with a person of imbecile mind, the inference naturally arises that it was obtained by circumvention or undue influence.[1] In *Blackford v. Christian*,[2] Lord Wynford said a bargain into which a weak mind is drawn, under the influence of deceit and falsehood, ought not to be held valid. And a degree of weakness of intellect far below that which would justify a jury, under a commission of lunacy, in finding him incapable of controlling his person and property, coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed."

§ 66. **Mere inadequacy of price or other inequality in the bargain** is not, it is said in the same case, "to be understood as constituting *per se* a ground to avoid a bargain in equity. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet or otherwise, profitable or unprofitable, are considerations not for courts of justice but for the party himself to deliberate upon. Where, however, the inadequacy is such as to demonstrate some gross imposition or undue influence, or, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud, equity ought to interfere. And gross inadequacy of price, when connected with suspicious circumstances or peculiar relations between the parties, affords a vehement presumption of fraud.

§ 67. **Partial insanity — Monomania — Sane intervals.**— It is not enough that the person may be partially insane, or insane only as to certain subjects, or that he may occasionally be insane, unless it appears also that the contract was in reference to those subjects to which his insanity applied, or was

[1] Citing 1 Story's Eq. Jur. 238-242. [2] 1 Knapp, 77.

made during his insane intervals. If made as to subjects in reference to which his incapacity did not exist,[1] or, in the other case, if made during his sane intervals,[2] the contract will be valid.

§ 68. —— **Presumption as to sane intervals.**— Where general or habitual insanity is shown to have existed during a given period, the presumption will be that it was continuous during that period, and the person who alleges that a sane interval existed at the time the particular contract was made must assume the burden of proving it.[3]

§ 69. **Effect of judicial determination of insanity.**— "All contracts of a lunatic, habitual drunkard or person of unsound mind," it is said in a late case,[4] "made after an inquisition and confirmation thereof, are absolutely void, until, by permission of the court, he is allowed to assume control of his property.[5] In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity. Contracts, however, made by this class of persons before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence.[6] Under such circumstances the proceedings in lunacy are presumptive, but not conclusive, evidence of a want of capacity. The presumption,

[1] Galpin v. Wilson, 40 Iowa, 90; Searle v. Galbraith, 73 Ill. 269.

[2] Lee v. Lee, 4 McCord (S. C.), 183, 17 Am. Dec. 722; In re Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Staples v. Wellington, 58 Me. 453; Lewis v. Baird, 3 McLean (U. S. C. C.), 56; Boyce v. Smith, 9 Gratt. (Va.) 704, 60 Am. Dec. 313.

[3] Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Case of Cochran's Will, 1 T. B. Mon. (Ky.) 264, 15 Am. Dec. 116, and note citing many cases.

[4] Hughes v. Jones, 116 N. Y. 67, 15 Am. St. R. 386, 22 N. E. R. 446.

[5] Citing L'Amoureaux v. Crosby, 2 Paige (N. Y.), 422, 22 Am. Dec. 655; Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; 2 N. Y. R. S., p. 1094, sec. 10. To the same effect: Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Leonard v. Leonard, 14 Pick. (Mass.) 283; Nichol v. Thomas, 53 Ind. 42; Freed v. Brown, 55 Ind. 310; Griswold v. Butler, 3 Conn. 227; Elston v. Jasper, 45 Tex. 409; Mohr v. Tulip, 40 Wis. 66; Imhoff v. Whitmer, 7 Casey (Pa.), 243.

[6] Citing 2 R. S., *supra;* Van Deusen v. Sweet, 51 N. Y. 378; Banker v. Banker, 63 N. Y. 409.

whether conclusive or only *prima facie*, extends to all the world, and includes all persons, whether they have notice of the inquisition or not."[1] The rule here laid down is approved by the majority of the courts, though the decisions differ in some respects owing to peculiarities of the local statutes and the composition and functions of the tribunal.[2]

§ 70. —— Inquisition only prima facie evidence as to period overreached by it.— As stated, however, the inquisition, while conclusive as to contracts subsequently made, is only *prima facie* evidence of incapacity during the period before the commencement of the proceeding and overreached by it, and it may be rebutted by evidence of actual capacity at the particular time at which the act in controversy was done.[3] So, on the other hand, a finding of insanity at a prior period is not conclusive, and may be rebutted.[4]

§ 71. —— Petitioner for proceeding not estopped by it.— The petitioner for the inquisition proceeding is not so far a party to the proceeding as to be estopped thereby, except as all the world is estopped, and he may, therefore, by evidence rebut the presumption arising out of the very proceeding which he himself has instituted.[5]

§ 72. Whether contract of insane person void or voidable.— It is laid down by many of the older authorities that the contract of the insane person, whether before or after office found, is void; but the decided tendency of the mod-

[1] Citing Hart v. Deamer, 6 Wend. (N. Y.) 497; Osterhout v. Shoemaker, 3 Hill (N. Y.), 513; 1 Greenl. Ev. § 556.

[2] See Hopson v. Boyd, 6 B. Mon. (Ky.) 296; Parker v. Davis, 8 Jones (N. C.), 460; Hart v. Deamer, 6 Wend. (N. Y.) 497; Little v. Little, 13 Gray (Mass.), 264; Yauger v. Skinner, 1 McCarter (N. J.), 389.

[3] Hughes v. Jones, 116 N. Y. 67, 22 N. E. R. 446, 15 Am. St. R. 386; L'Amoureaux v. Crosby, 2 Paige (N. Y.), 422, 22 Am. Dec. 655; Field v. Lucas, 21 Ga. 447, 68 Am. Dec. 465; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 691.

[4] Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414.

[5] Hughes v. Jones, 116 N. Y. 67, 22 N. E. R. 446, 15 Am. St. R. 386; In re Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Hutchinson v. Sandt, 4 Rawle (Pa.), 234, 26 Am. Dec. 127.

ern cases is to the effect that the contract made before office found is voidable and not void, and this may be said to be the prevailing rule.[1] At the same time there are some very cogent reasons which have been brought forward in recent cases in support of the older rule. Thus it is said by Mr. Justice Strong in the United States supreme court:[2] "The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficiency as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one, who has obtained from him that which purports to be a contract, be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds, and as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary un-

[1] Odom v. Riddick, 104 N. C. 515, 10 S. E. R. 609, 17 Am. St. R. 686; Pearson v. Cox, 71 Tex. 246, 9 S. W. R. 124, 10 Am. St. R. 740; Riggan v. Green, 80 N. C. 236, 30 Am. R. 77; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. R. 716; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Allis v. Billings, 6 Met. (Mass.) 415, 39 Am. Dec. 744; Carrier v. Sears, 4 Allen (Mass.), 336, 81 Am. Dec. 707; Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 239, 19 Am. Dec. 71; Allen v. Berryhill, 27 Iowa, 534, 1 Am. R. 309; Creekmore v. Baxter, 121 N. C. 81, 27 S. E. R. 994; Louisville, etc. Ry. Co. v. Herr, 135 Ind. 591, 35 N. E. R. 556 (citing Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. R. 80; Boyer v. Berryman, 123 Ind. 451, 24 N. E. R. 249; Schuff v. Ransom, 79 Ind. 458; Fay v. Burditt, 81 Ind. 433; Hardenbrook v. Sherwood, 72 Ind. 403; Wray v. Chandler, 64 Ind. 146; Freed v. Brown, 55 Ind. 310; Nichol v. Thomas, 53 Ind. 42; Musselman v. Cravens, 47 Ind. 1); Gribben v. Maxwell, 34 Kan. 8, 7 Pac. R. 584, 55 Am. R. 233; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. R. 1; Ætna L. Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. R. 97.

[2] In Dexter v. Hall, 15 Wall. (U. S.) 9.

derstanding. While he continues insane he cannot avoid it, and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself; yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation, and he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection; but as a lunatic cannot avoid a contract for want of mental capacity he has no protection if his contract is only voidable." Reasoning to the same effect may be found in other cases,[1] but it has not been deemed sufficient to establish the rule of absolute invalidity.

After office found, however, and during its continuance,[2] though not after its termination or abandonment,[3] the contract of the incompetent is held absolutely void.

§ 73. Avoiding contract — Executed and executory contracts. — Contracts of an insane person made before office found,

[1] See opinion of Cole, J., in Allen v. Berryhill, 27 Iowa, 540; of Gibson, C. J., in Desilver's Estate, 5 Rawle (Pa.), 110; and the case of Van Deusen v. Sweet, 51 N. Y. 378 (but compare Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. R. 264); Rogers v. Blackwell, 49 Mich. 192, 13 N. W. R. 512; Sullivan v. Flynn, 20 D. C. 396; Farley v. Parker, 6 Oreg. 105.

The rule of absolute invalidity is strongly established in the federal courts, following Dexter v. Hall, *supra*. See Parker v. Marco, 76 Fed. R. 510; German Sav. & Loan Society v. De Lashmutt, 67 Fed. R. 399.

[2] Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Leonard v. Leonard, 14 Pick. (Mass.) 280.

[3] Mohr v. Tulip, 40 Wis. 66; Elston v. Jasper, 45 Tex. 409. In Thorpe v. Hanscom (1896), 64 Minn. 201, 66 N. W. R. 1, the head-note by the court is as follows: "The deed of an insane person not under guardianship is voidable only; but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid deed concerning his estate, though he is in fact sane at the time he attempts to do so. If, however, at the time he made the deed, he was in fact of sound mind, and the contract fair, and the guardianship had been practically abandoned, the deed is valid though the guardian had not been formally discharged by the court."

which yet remain purely executory, require, ordinarily, no express act of disaffirmance, and are therefore much more readily and justly avoided than after they have been partially or fully executed.[1] This is particularly so when the mental unsoundness was known to the other party or might have been discovered by the exercise of ordinary observation.[2] Contracts for necessaries, however, though executory, stand upon different ground, and will be considered later.[3]

In the case of executed contracts, on the other hand, different elements intervene. Thus it becomes material to inquire whether the other party knew of the insanity, whether it was in the ordinary course of business, and whether the parties can be put *in statu quo.* Influenced by such considerations it is obvious that many executed contracts ought not to be disturbed which would not have been enforced so long as they remained purely executory; and as the result of these elements the modern rule has grown up that —

§ 74. —— **Protection of innocent party.**— Where the sane party has entered into the contract, before office found, in good faith, without notice of the other's insanity and with nothing in the surrounding circumstances to reasonably apprise him of the fact, the contract executed, if fair and equitable, will not

[1] Musselman v. Cravens, 47 Ind. 1; Van Patton v. Beals, 46 Iowa, 62; Sentance v. Poole, 3 Car. & P. (Eng.) 1; Dunnage v. White, 1 Wils. Ch. (Eng.) 67; Hall v. Warren, 9 Ves. (Eng.) 605. In Fay v. Burditt, 81 Ind. 433, 42 Am. R. 142, it is said: "If the contract in respect to the party of unsound mind is wholly executory, no act of disaffirmance is necessary and the incapacity may of course be pleaded in defense to the action by the other party or his assignee. But if the contract has been performed, or if the consideration has been paid, or the possession of property parted with, under the contract, by the party under disability, there must be an act of disaffirmance before the other party can be put in the wrong, and a complete right of action established to recover the consideration so paid, or the possession of property which has been surrendered or taken away under the contract or deed." Citing Musselman v. Cravens, 47 Ind. 1; Nichol v. Thomas, 53 Ind. 42; Freed v. Brown, 55 Ind. 310; Wray v. Chandler, 64 Ind. 146; Hardenbrook v. Sherwood, 72 Ind. 403; Schuff v. Ransom, 79 Ind. 458.

[2] Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428.

[3] See *post,* § 84.

be set aside unless the parties can be put *in statu quo*. Not all of the cases support this rule, but it is sustained by the great weight of authority.[1] The converse of this rule is, of course, true, for if the other party had notice of the insanity, or, what

[1] As by Moulton v. Camroux, 2 Exch. (Eng.) 502, where the rule is stated as follows: "We are not disposed to lay down so general a proposition as that all executed contracts *bona fide* entered into must be taken as valid, though one of the parties be of unsound mind: we think, however, that we may safely conclude that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside by the alleged lunatic or those who represent him," and by Flack v. Gottschalk Co. (1898), 88 Md. 368, 41 Atl. R. 908, 42 L. R. A. 745, 71 Am. St. R. 418; McKenzie v. Donnell (1899), 151 Mo. 461, 52 S. W. R. 214; Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573; Lancaster County Bank v. Moore, 78 Pa. St. 407, 21 Am. R. 24; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Allen v. Berryhill, 27 Iowa, 534, 1 Am. R. 309; Fay v. Burditt, 81 Ind. 433, 42 Am. R. 142; Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. R. 202; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. R. 716; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Odom v. Riddick, 104 N. C. 515, 10 S. E. R. 609, 17 Am. St. R. 686; Lincoln v. Buckmaster, 32 Vt. 658; Long v. Long, 9 Md. 348; Matthiessen. etc. Co. v. McMahon, 38 N. J. L. 536; Scanlan v. Cobb, 85 Ill. 296; Wilder v. Weakley, 34 Ind. 184 (where the court say: "We think it may be safely stated, both on principle and authority, that where a person, apparently of sound mind, and not known to be otherwise, and who has not been found to be otherwise by proper proceedings for that purpose, fairly and *bona fide* purchases property and receives and uses the same, whereby the contract of purchase becomes so far executed that the parties cannot be placed *in statu quo*, such contract cannot afterward be set aside or payment for the goods refused, either by the alleged lunatic or his representatives." But see Northwestern, etc. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. R. 185; Hull v. Louth, 109 Ind. 315, 58 Am. R. 405, 10 N. E. R. 270).

In Strodder v. Southern Granite Co. (1896), 99 Ga. 595, 27 S. E. R. 174, where the party seeking to disaffirm set up his poverty as an excuse for not restoring the consideration, the court said: "Unless the plaintiff plainly alleges facts showing that his inability to make restitution arose from causes beyond his control, a court of equity cannot, merely because of a present inability on his part from poverty to restore the original status existing between himself and his adversary, grant the relief he seeks."

But, *contra*, in Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372, where the question was as to the

is the same thing, such facts as should have put him upon inquiry,[1] and, *a fortiori*, if he took advantage of it, or if the contract is unfair and inequitable, the transaction will not be sustained, even though the parties cannot be placed *in statu quo*.[2]

In a leading case,[3] laying down the rule, it appeared that a merchant, in the ordinary course of trade, and with nothing to indicate his incapacity, had purchased goods of a wholesale dealer, paying partly in other goods previously delivered, and partly in cash. Afterwards he was declared insane from a period of only two days later than the sale. The representative of the insane person tendered back the goods received from the wholesale dealer, and sued him for the value of the goods delivered by the insane person, as for a cash sale. After disposing of other questions, the court, by Gibson, C. J., said: "Should he have made a wild and unthrifty purchase from a stranger unapprised of his infirmity, who is to bear the loss that must be incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortune, on the principle that, where a loss must

right to recover the value of a promissory note pledged by the plaintiff, while insane, to the defendant, the court said: "We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant, and this being admitted, we think it cannot avail him as a legal defense, to show that he was ignorant of the fact, and practiced no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity. The defendant's counsel rely principally on a distinction between contracts executed and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract, for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyances of a *non compos* are voidable, and may be avoided by the writ *dum fuit non compos mentis*, or by entry."

[1] Lincoln v. Buckmaster, 32 Vt. 652; Rhoades v. Fuller, 139 Mo. 179, 40 S. W. R. 760.

[2] Henry v. Fine, 23 Ark. 417; Lincoln v. Buckmaster, 32 Vt. 652; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. R. 766.

[3] Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573.

be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and when such a man goes into the market, makes strange purchases and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman would exclude every speculator from the transactions of commerce."

§ 75. ——. In a later case,[1] in the same court, it is said: "The soundness of this rule is too apparent to need any extended vindication. Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with a particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such person should be allowed to obtain the property of innocent parties, and retain both the property and its price."

§ 76. —— **Insane person must have received benefit.**— But this rule of protection cannot apply where the insane person received nothing under the contract and it was therefore of no benefit to him, even though the other party acted in good faith and in ignorance of the insanity. Thus, though a mortgage for money loaned to an insane person, in good faith and used by him, may not be avoided,[2] a mortgage made by an insane woman to secure money loaned to her husband is not entitled to such protection.[3] For like reasons, a conveyance made by an insane person without any consideration will not be sustained as against a subsequent incumbrance in good faith,[4] nor can an accommodation indorser of negotiable paper

[1] Lancaster County Bank v. Moore, 78 Pa. St. 407, 21 Am. R. 24.

[2] Copenrath v. Kienby, 83 Ind. 18.

[3] Northwestern, etc. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. R. 185.

[4] Hull v. Louth, 109 Ind. 315, 58 Am. R. 405, 10 N. E. R. 270.

who receives no benefit, and who was insane at the time of indorsing, be held by a subsequent *bona fide* holder.[1]

§ 77. —— **Return of consideration necessary.**— It follows as a corollary of the rule of the last section, that, in order to disaffirm a fair and equitable contract, executed by one who has entered into it in good faith without notice of the insanity, the representatives of the insane person must restore to such other party the consideration he has parted with in pursuance of the contract.[2] Such restoration, however, is not necessary when the other party had notice of the insanity.[3] As is said in one case: "He who knowingly deals with a madman takes the risk of losing." So, speaking of the claim that the contract may be rescinded without restoring the consideration, it is said by the court in New Jersey:[4] "This is good law where there is fraud practiced upon one who is known at the time to be insane, but it is not the law where the purchase and conveyance are made in good faith, for a good consideration, and without knowledge of the insanity; not only must the consideration be

[1] Wirebach v. First Nat. Bank, 97 Pa. St. 543, 39 Am. R. 821; McClain v. Davis, 77 Ind. 419.

[2] Eaton v. Eaton, 37 N. J. L. 108, 18 Am. R. 716; Riggan v. Green, 80 N. C. 236, 30 Am. R. 77; Pearson v. Cox, 71 Tex. 246, 9 S. W. R. 124, 10 Am. St. R. 740; Fay v. Burditt, 81 Ind. 433, 42 Am. R. 142; Boyer v. Berryman, 123 Ind. 451, 24 N. E. R. 249; Gribben v. Maxwell, 34 Kan. 8, 55 Am. R. 233, 7 Pac. R. 584 [disapproving In re Desilver, 5 Rawle (Pa.), 110, 28 Am. Dec. 645; Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 82 U. S. (15 Wall.) 9]; Allis v. Billings, 6 Met. (Mass.) 415, 39 Am. Dec. 744; Rusk v. Fenton, 14 Bush (Ky.), 490, 29 Am. R. 413. [In this case the insane man's wife who had conveyed property of her own in payment for that received by her husband was not permitted to rescind, as the other party could not be placed *in statu quo*.] Schaps v. Lehner (1893), 54 Minn. 208, 55 N. W. R. 911. *Contra*, where nothing has been done to ratify or confirm the act. Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414. Limiting Arnold v. Richmond Iron Works, 1 Gray (Mass.), 434; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Wall v. Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

[3] Crawford v. Scovell, 94 Pa. St. 48, 39 Am. R. 766; Henry v. Fine, 23 Ark. 417; Lincoln v. Buckmaster, 32 Vt. 652; Thrash v. Starbuck (1896), 145 Ind. 673, 44 N. E. R. 543.

[4] Eaton v. Eaton, 37 N. J. L. 108, 18 Am. R. 716.

returned in such cases before the conveyance will be avoided, but courts of equity and courts of law have gone further, and held that where persons apparently of sound mind, and not known to be otherwise, enter into a contract which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties *in statu quo*, such contract cannot be set aside either by the alleged lunatic or those who represent him."

§ 78. —— **Right to recover property from third person who bought it in good faith.**— The question has been raised in a number of cases whether property purchased from an insane person but conveyed, before repudiation, to a third person who bought in good faith and for a valuable consideration, can be recovered from the latter, even upon repayment of the consideration. In a late case[1] of the sale of real estate, it was held that the title of such a *bona fide* purchaser could not be divested. "The presumption of the law," said the court, "is in favor of sanity, and this presumption is so strong that, when a want of it is claimed, even in a capital case, the burden is on the defendant to prove it, the presumption of sanity being stronger than the presumption of innocence. When, therefore, a purchaser sees a regular chain of title, formal in all particulars, upon the registration books, executed by grantors of full age and not *feme coverts*, he has a right to rely upon the presumption of sanity; and if, without any notice or matter to put him upon inquiry, and for fair value, he takes a deed, he should be protected. Any other doctrine would place all titles upon the hazard."

§ 79. —— But in other cases it has been held that such a purchaser is not protected and that the property may be recovered from him although the consideration is not restored.

[1] Odom v. Riddick, 104 N. C. 515, 10 S. E. R. 609, 17 Am. St. R. 686. The court liken the case to one where a *bona fide* purchaser has acquired title from the vendee of a defrauded vendor.

In one such case[1] the court said: "The grantee whose title is thus derived must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and a paramount right superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee."

The statement of the rule as last quoted was approved in Indiana in a case in which a *bona fide* mortgagee sought to enforce a mortgage upon lands which were obtained by the mortgagor from an insane grantor whose deed had been duly recorded. The mortgagee was held to be not entitled to foreclose against the insane grantor.[2]

§ 80. **Who may disaffirm.**— Where the right to disaffirm exists, it may be exercised by the person himself when he has recovered from his disability, or it may be exercised by his guardian or committee, or by his personal representatives or heirs after his death.[3]

§ 81. **—— Creditor may not.**— But a creditor of the insane person cannot avoid a conveyance made by his debtor solely

[1] Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705. The court declare the case unlike that of the defrauded vendor, but like that of the infant, as to which it is held that a *bona fide* purchaser from the infant's vendee has a defeasible title. Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409. The Maine court, however, approve Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 373, and Gibson v. Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414, which, as has been seen, have not been generally followed elsewhere.

[2] Hull v. Louth, 109 Ind. 315, 10 N. E. R. 270, 58 Am. R. 405. See to like effect: Rogers v. Blackwell, 49 Mich. 192, 13 N. W. R. 512; Northwestern, etc. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. R. 185. See also Wirebach v. First National Bank, 97 Pa. St. 543, 39 Am. R. 821.

The Indiana court also liken the case to that of the infant, who may recover the land even from an innocent third person. Miles v. Lingerman, 24 Ind. 385; Richardson v. Pate, 93 Ind. 423, 47 Am. R. 374; Wiley v. Wilson, 77 Ind. 596; Law v. Long, 41 Ind. 586.

[3] Northwestern, etc. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. R. 185; Bunn v. Postell (1899), 107 Ga. 490, 33 S. E. R. 707. But the administrator of an insane grantee cannot avoid a deed to him and recover the consideration paid. Campbell v. Kuhn, 45 Mich. 513, 40 Am. R. 479, 8 N. W. R. 523.

because the latter was of unsound mind when he made it. "Nor does the fact that the grantee, knowing of the debt and of the debtor's mental weakness, took advantage of such weakness for the purpose and with the intention of thereby defrauding the creditor, authorize the creditor to appeal to a court of equity to set aside such deed, unless he is injured thereby."[1]

§ 82. —— **Sane party may not.**— So it is held that, though the insane party or his representatives may disaffirm the contract on the ground of the insanity, the sane party to the contract may not, on that ground, disaffirm it while the insane party or his representatives are ready and willing to perform and seek to maintain the contract as valid.[2]

§ 83. **Affirmance of the contract.**— The former insane person may also, after recovering from his disability either permanently or temporarily,[3] ratify and confirm the contract made during his disability; and, when he acts intelligently, he may do this expressly or by implication, and either tacitly, as where he neglects to repudiate within the proper time, or actively, as where he insists upon and enforces performance of the contract by the other party.[4] The representatives of the insane person may also ratify by enforcing the contract against the sane party, who may not set up the disability as a defense to himself.[5]

§ 84. **Contract for necessaries binding.**— "Ever since the case of *Stiles v. West*,"[6] said Chief Justice Gibson, "it has been held that the executed contract of a *non compos mentis* for nec-

[1] Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. R. 664, 22 Am. St. R. 649.

[2] Allen v. Berryhill, 27 Iowa, 534, 1 Am. R. 309.

[3] As to ratification during lucid interval, see Blakeley v. Blakeley (1881), 33 N. J. Eq. 502.

[4] Arnold v. Richmond Iron Works (1854), 1 Gray (Mass.), 434. Acceptance of the benefits, to constitute a ratification, must be the intelligent act of the party, knowing that he is acting under the contract and understandingly availing himself of its provisions in his favor. Bond v. Bond (1863), 7 Allen (Mass.), 1. And, generally, the ratification after restoration to sanity must appear to be the intelligent act of the party. Beasley v. Beasley (1899), 180 Ill. 163, 54 N. E. R. 187.

[5] Allen v. Berryhill (1869), 27 Iowa, 534, 1 Am. R. 309.

[6] Cited in Manly v. Scott, 1 Sid. 109.

essaries, *bona fide* supplied, stands on the footing of an infant's contract for necessaries. In *Baxter v. The Earl of Portsmouth*,[1] it was said that the word 'necessaries' is not to be restricted to articles of the first necessity, but that it includes everything proper for the person's condition, and it was determined that to hire carriages to a nobleman who, though actually insane, voted in parliament and went about as other men do, carried with it no mark of imposition." The court, therefore, held the insane person's estate chargeable for board, washing and maintenance furnished to him.[2] In many other cases the same rule has been applied and the estate of the incompetent has been held chargeable, like an infant's, for the reasonable value of those things which were suitable and necessary for one in his condition and which were furnished to him in good faith.[3]

Within the class of necessaries in addition to sustenance, shelter and raiment, fall medical services, nursing, and a guard to protect him against self-injury;[4] services and expenses for the preservation of his estate,[5] and, where he was wealthy, the court held that pleasures and even luxuries should be allowed.[6] Necessaries furnished to the lunatic's wife are likewise a proper charge against him.[7]

§ 85. —— **Liability limited to value received.**— The liability of the lunatic, however, is limited to the value of that only of which he has had the actual use and benefit, and he cannot therefore be held for other things procured ostensibly for him by a self-constituted agent, but appropriated by the latter to his own benefit.[8]

[1] 2 Car. & P. 178, 5 B. & C. 170.

[2] La Rue v. Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700.

[3] Ex parte Northington, 37 Ala. 496, 79 Am. Dec. 67; Tally v. Tally, 2 Dev. & B. Eq. (N. C.) 385, 34 Am. Dec. 407; Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592; Stannard v. Burns (1891), 63 Vt. 244, 22 Atl. R. 460; Sawyer v. Lufkin, 56 Me. 308; McCormick v. Littler, 85 Ill. 62; Kendall v. May, 10 Allen (Mass.), 59.

[4] Richardson v. Strong, 13 Ired. (N. C.) L. 106, 55 Am. Dec. 430.

[5] Williams v. Wentworth, 5 Beav. (Eng.) 325.

[6] Kendall v. May, 10 Allen (Mass.), 62. See also In re Perrse, 3 Molloy, 94.

[7] Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658. 20 Am. Dec. 199.

[8] Surles v. Pipkin, 69 N. C. 513.

b. Incompetency by Reason of Drunkenness.

§ 86. **Contracts of drunken persons.** — The contracts of drunken persons stand upon much the same ground as the contracts of the insane. Intoxication will avoid a contract when, and, usually, only when, it was so extreme that the party sought to be charged was incapable of clearly perceiving and assenting to the contract.[1] Where it is of this degree, the other party need not have participated in causing it;[2] but where he did, a much less degree will suffice to invalidate the contract.[3]

§ 87. —— **Contract voidable and not void.** — The contract of the drunken person is voidable only and not void,[4] and if he would disaffirm it he must make restitution of what he has received under it.[5] After he becomes sober he may likewise affirm it,[6] and affirmance will be presumed where, with knowledge, he retains the consideration.[7]

§ 88. —— **Bona fide holders.** — Complete incapacity resulting from drunkenness should, it has been said, render his nego-

[1] Wade v. Colvert, 2 Mill (S. C.), 27, 12 Am. Dec. 652; French v. French, 8 Ohio, 214, 31 Am. Dec. 441; Bush v. Breinig, 113 Pa. St. 310, 6 Atl. R. 86, 57 Am. R. 469; Wright v. Fisher, 65 Mich. 279, 32 N. W. R. 605, 8 Am. St. R. 886; Bates v. Ball, 72 Ill. 108; Caulkins v. Fry, 35 Conn. 170.

[2] Wigglesworth v. Steers, 1 H. & M. (Va.) 70, 3 Am. Dec. 603.

[3] Willcox v. Jackson, 51 Iowa, 208, 1 N. W. R. 513; Hotchkiss v. Fortson, 7 Yerg. (Tenn.) 67; White v. Cox, 3 Hayw. (Tenn.) 79; Henry v. Ritenour, 31 Ind. 136.

[4] Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. R. 156, 1 Am. St. R. 595, citing Matthews v. Baxter, L. R. 8 Ex. (Eng.) 132; Caulkins v. Fry, 35 Conn. 170; Foss v. Hildreth, 10 Allen (Mass.), 76; Van Wyck v. Brasher, 81 N. Y. 260; Warnock v. Campbell, 25 N. J. Eq. 485; French v. French, 8 Ohio, 214, 31 Am. Dec. 441; Noel v. Karper, 53 Pa. St. 97; Dulany v. Green, 4 Harr. (Del.) 285; Cummings v. Henry, 10 Ind. 109; Cory v. Cory, 1 Ves. Sr. (Eng.) 19; Pitt v. Smith, 3 Camp. 33; Newell v. Fisher, 11 S. & M. (Miss.) 431, 49 Am. Dec. 66; Reynolds v. Waller, 1 Wash. (Va.) 164; Menkins v. Lightner, 18 Ill. 282; Taylor v. Patrick, 1 Bibb (Ky.), 168; Broadwater v. Darne, 10 Mo. 277; Hutchinson v. Brown, 1 Clarke (N. Y.), Ch. 408.

[5] Joest v. Williams, 42 Ind. 565, 13 Am. R. 377; McGuire v. Callahan, 19 Ind. 128.

[6] Carpenter v. Rodgers, *supra*, and cases cited.

[7] Per Alderson, B., in Gore v. Gibson, 13 Mees. & W. 623.

tiable instrument void,[1] even in the hands of a *bona fide* holder, though the contrary has been held;[2] and certainly nothing less than entire incapacity ought to affect the *bona fide* holder in the absence of such fraud on the maker as amounts to illegality.[3]

§ 89. **Habitual drunkards.**— The contract of even the habitual drunkard is good if made during a sober interval.[4] But —

§ 90. **Partial intoxication or weakness coupled with fraud.** Where, through long-continued indulgence, the mind has become weakened, or where, though the person is not completely incapacitated by present drunkenness, he is still to some degree incompetent, and the other party knew of his condition, the transaction must appear to have been fair and open,[5] and fraud or overreaching will, of course, avoid it.[6]

§ 91. **Drunkard under guardianship.**— If, because of his incapacity, the habitual drunkard has been placed under legal guardianship, and the control of his estate has been removed from him, contracts made by him thereafter will be of no effect.[7]

[1] Daniel on Neg. Inst., § 210.

[2] State Bank v. McCoy, 69 Pa. St. 204, 8 Am. R. 246; McSparran v. Neely, 91 Pa. St. 17.

[3] Miller v. Finley, 26 Mich. 249, 12 Am. R. 306.

[4] Ritter's Appeal, 59 Pa. St. 9. See also Van Wyck v. Brasher, 81 N. Y. 260.

[5] In Holland v. Barnes, 53 Ala. 83, 25 Am. R. 595, Brickell, C. J., says: "When evidence is given that on an insufficient consideration a promissory note has been obtained from a person enfeebled in body and mind, by disease and long-continued drunkenness, and who at its execution is under the influence of liquor, a presumption of fraud arises which must be countervailed by evidence of a fair consideration, and fair and honest dealing on the part of him who claims the note as a valid contract. Hale v. Brown, 11 Ala. 87."

[6] Hotchkiss v. Fortson, 7 Yerg. (Tenn.) 67; White v. Cox, 3 Hayw. (Tenn.) 79; Calloway v. Witherspoon, 5 Ired. (N. C.) Eq. 128; Cruise v. Christopher, 5 Dana (Ky.). 181; Henry v. Ritenour, 31 Ind. 136; Mansfield v. Watson, 2 Iowa, 111; Murray v. Carlin, 67 Ill. 286.

[7] See *ante*, § 72; Lynch v. Dodge, 130 Mass. 458; Manson v. Felton, 13 Pick. (Mass.) 206.

c. Incompetency of Spendthrifts, etc.

§ 92. Spendthrifts and other persons under guardianship. Provision is usually made by statute for the appointment of guardians for such persons as by drinking, gaming, debauchery or incompetence are likely to squander their estates and become charges upon the public. The effect of proceedings resulting in the appointment of a guardian is usually to take away from the ward, during guardianship, all general capacity to enter into contracts, though, as in the case of insane persons and infants, he may bind himself for necessaries.[1]

2. *Legal Incompetency.*

§ 93. In general.— In addition to the various kinds of incapacity which have been denominated *natural*, are certain others which exist not so much because of any inherent or natural incompetency, but rather as the result of express rules of law declared for the purpose not only of guarding against supposed weakness or exposure to improper influences, but also of subserving certain ends approved by the general policy of the law.

Of these kinds of incapacity, the most important are those of the infant and the married woman. Corporations and other more or less similar bodies are also subject to legal incapacity.

Of the incapacity of the infant, it is to be said that his incompetency may be the result of both classes of causes. During his tender years he is under a natural incapacity, but as he approaches more and more nearly to the period of his majority — a period arbitrarily established — he becomes less and less subject to any natural incapacity and is subject only to that which the law imposes upon him. He may thus be actually as competent to act in his own behalf on the day before he attains his majority as on the day after; but the law makes no such distinction.

The same may be said of the married woman. She may

[1] Manson v. Felton, 13 Pick. (Mass.) 508, 93 Am. Dec. 117; Lynch v. 206; Chandler v. Simmons, 97 Mass. Dodge, 130 Mass. 459.

have as much actual capacity to make contracts the day after her marriage as she had the day before; but here again the common law imposes an arbitrary bar.

a. Of the Incapacity of the Infant.

§ 94. In general.—The question of the general contractual incapacity of the infant is one foreign to the present work, and the matter of his particular incapacity to buy and sell chattels might also, perhaps, be properly excluded from consideration herein; but, in the belief that it may subserve a purpose sufficiently useful to justify the space consumed, a general view of this narrower field will be attempted.

§ 95. Infant's contracts are voidable and not void.—It is now well settled, as a general rule, that the contracts of an infant are voidable merely and not void; and this rule applies as well to his deeds and conveyances of his real estate[1] as to his sales, mortgages and assignments of his personal property.[2]

Without attempting to go at large into all the matters which may be suggested by this discussion, a few points may be briefly touched upon. Thus —

§ 96. —— What meant by voidable.— With respect of voidable contracts generally, it is ordinarily true that they are valid till avoided, and not void till ratified. With respect of the

[1] Cole v. Pennoyer, 14 Ill. 158; Keil v. Healey, 84 Ill. 104, 25 Am. R. 434; Green v. Wilding, 59 Iowa, 679, 13 N. W. R. 761, 44 Am. R. 696; Philips v. Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Davis v. Dudley, 70 Me. 236, 35 Am. R. 318; Youse v. Norcoms, 12 Mo. 549, 51 Am. Dec. 175; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Wilson v. Branch, 77 Va. 65, 46 Am. R. 709; Birch v. Linton, 78 Va. 584, 49 Am. R. 381; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. R. 445; Logan v. Gardner, 136 Pa. St. 588, 20 Am. St. R. 939, 20 Atl. R. 625.

[2] Holmes v. Rice, 45 Mich. 142, 7 N. W. R. 772; Williams v. Brown, 34 Me. 594; Kingman v. Perkins, 105 Mass. 111; Cogley v. Cushman, 16 Minn. 397; Corey v. Burton, 32 Mich. 30; Osburn v. Farr, 42 Mich. 154, 3 N. W. R. 299; Rice v. Boyer, 108 Ind. 472, 9 N. E. R. 420, 58 Am. R. 53; Soper v. Fry, 37 Mich. 236.

contracts of infants, the word seems not to have in all cases the same meaning. Where the contract made by the infant has been *executed* on his part, that is, where he has parted with something which he was to part with under the contract, it is said that the contract is binding until it is avoided by the infant, by words or conduct which show that he refuses longer to be bound by it. "But when it is said that the *executory* contract of an infant is voidable, the idea represented is that the contract is susceptible of confirmation or avoidance by the promisor, though it is not binding until it is ratified."[1] This distinction between the executed and the executory contract of the infant has been criticised. Thus it is said in one place:[2] "This is a senseless and erroneous distinction. Executory contracts of infants are no more invalid than executed contracts. Both are binding until disaffirmed. No one would contend that infants' executory contracts could be disregarded as nullities by the adult contracting parties, or by third persons, until they had been ratified; yet this is precisely what the doctrine leads to. It may be that a ratification will result from less positive acts or conduct in case of executed contracts than in case of executory; but this does not prove that the one class has a greater binding effect than the other." It must be conceded, however, that the distinction has found quite a firm lodgment in our law.[3]

§ 97. —— **Who may avoid.**—The privilege of infancy is a personal one, which can be availed of only by the infant himself and those who represent him personally.[4] The other party to the contract cannot insist upon this disability, if the infant

[1] Minock v. Shortridge (1870), 21 Mich. 304; Edgerly v. Shaw (1852), 25 N. H. 514, 57 Am. Dec. 349; State v. Plaisted (1862), 43 N. H. 413; Morton v. Steward (1879), 5 Ill. App. 533; Lynch v. Johnson (1896), 109 Mich. 640, 67 N. W. R. 908.

[2] Note to Craig v. Van Bebber, 18 Am. St. R. 579.

[3] See, for example, the very late case of Nichols & Shepard Co. v. Snyder (1900), 78 Minn. 502, 81 N. W. R. 516.

[4] Oliver v. Houdlet (1816), 13 Mass. 237, 7 Am. Dec. 134; Cannon v. Alsbury (1817), 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Patterson v. Lippincott (1885), 47 N. J. L. 457, 54 Am. R. 178.

does not see fit to raise it.[1] Neither can a stranger to the contract take advantage of it.[2] The infant's creditors, moreover, are precluded,[3] and so is his assignee in bankruptcy or insolvency.[4] As stated in one case,[5] "Voidable acts by an infant can be avoided by none but himself or his privies in blood, and not by privies in estate; and this right of avoidance is not assignable."

The infant's heir,[6] however, or guardian,[7] or personal representative,[8] may avoid the contract if the time has not expired.

§ 98. —— **When avoided.**— With respect of the time at which the infant's contracts may be avoided, a distinction is made between his conveyances of realty and his contracts respecting personalty. The former may usually be effectively avoided only after he becomes of age; but the latter, by the weight of authority, may be avoided either during his minority or within a reasonable period thereafter.[9]

§ 99. —— **When ratify.**— While the infant may thus disaffirm during infancy, he cannot, for obvious reasons, effectually ratify until he becomes of age; for the ratification is the

[1] Holt v. Ward Clarencieux (1732), 2 Strange, 937; Monaghan v. Insurance Co. (1884), 53 Mich. 238; Hunt v. Peake (1826), 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Stiff v. Keith (1887), 143 Mass. 224.

[2] Board of Trustees v. Anderson (1878), 63 Ind. 367, 30 Am. R. 224; Holmes v. Rice (1881), 45 Mich. 142, 7 N. W. R. 772; Soper v. Fry (1877), 37 Mich. 236.

[3] Kingman v. Perkins (1870), 105 Mass. 111; Yates v. Lyon (1874), 61 N. Y. 344.

[4] Mansfield v. Gordon (1887), 144 Mass. 168, 10 N. E. R. 773.

[5] Austin v. Charlestown Seminary (1844), 8 Met. (Mass.) 196.

After the contract has been duly avoided by the infant personally, however, then his privies in estate may avail themselves of such avoidance. Shrock v. Crowl (1882), 83 Ind. 243.

[6] Illinois Land Co. v. Bonner (1874), 75 Ill. 315; Veal v. Fortson (1882), 57 Tex. 482.

[7] Compare Oliver v. Houdlet (1816), 13 Mass. 237, 7 Am. Dec. 134; Chandler v. Simmons (1867), 97 Mass. 508, 93 Am. Dec. 117.

[8] Tillinghast v. Holbrook (1862), 7 R. I. 230; Shropshire v. Burns (1871), 46 Ala. 108.

[9] House v. Alexander (1885), 105 Ind. 109, 55 Am. R. 189; Rice v. Boyer (1886), 108 Ind. 472, 58 Am. R. 53; Miller v. Smith (1879), 26 Minn. 248, 37 Am. R. 407; Stafford v. Roof (1827), 9 Cow. (N. Y.) 626.

act which is to give the final validity to the act and requires full capacity. Otherwise he might claim to disaffirm his ratification.

§ 100. —— **How much to be ratified.**— If the infant ratifies or repudiates at all, he must in general deal with the whole contract, and not with inseparable parts of it.[1] He clearly may not, after he becomes of age, so ratify a part as to secure the benefits of the contract while he repudiates its liabilities.

§ 101. —— **Effect of ratification.**— The ordinary effect of ratification is that the contract then becomes binding from the beginning, and not merely from the date of ratification.[2] When once effectually ratified, the contract cannot be subsequently disaffirmed.[3]

§ 102. —— **Knowledge of non-liability.**— Whether the acts of the former infant relied upon as constituting ratification must have been done with knowledge that he was not legally liable upon the contract, is a question upon which the authorities are in conflict; with the weight of reason and modern authority to the effect that, in the absence of fraud or unfair advantage on the part of the other party, such knowledge is not necessary.[4]

[1] Biederman v. O'Connor (1886), 117 Ill. 493; Langdon v. Clayson (1889), 75 Mich. 204; Uecker v. Koehn (1887), 21 Neb. 559, 59 Am. R. 849; Lynde v. Budd (1830), 2 Paige (N. Y.), Ch. 191, 21 Am. Dec. 84; Bigelow v. Kinney (1830), 3 Vt. 353, 21 Am. Dec. 589; American Freehold Mtg. Co. v. Dykes (1895), 111 Ala. 178, 56 Am. St. R. 38.

[2] Minock v. Shortridge (1870), 21 Mich. 304; Hall v. Jones (1863), 21 Md. 439; Cheshire v. Barrett (1827), 4 McCord (S. C.), 241, 17 Am. Dec. 735.

But in Minock v. Shortridge, *supra*, in reference to *executory* contracts, the court say that the former infant may make his ratification partial or conditional; in which event it will be binding only according to its terms.

[3] See Hastings v. Dollarhide (1864), 24 Cal. 195; Voltz v. Voltz (1883), 75 Ala. 555.

[4] Mr. Greenleaf (Evidence, vol. II, § 367) lays down the rule that such knowledge is necessary, and his statement has been often quoted, as, *e. g.*, in Turner v. Gaither (1880), 83 N. C. 357, 35 Am. R. 574 [see also Hinely v. Margaritz (1846), 3 Pa. St. 428]; but the more modern cases are the other way. Anderson v. Soward (1883), 40 Ohio St. 325, 48 Am. R. 687;

§ 103. —— Consideration for the ratification.— No new consideration for the ratification is necessary.[1] The contract, by the hypothesis, was only voidable, not void; the ratification does not amount to the making of a new contract, but is simply indicative of a final intention to be bound by one already made upon a sufficient consideration.

§ 104. —— Ratification, how effected.— Unless required by statute, as in some cases where written ratification is prescribed, no particular form of ratifying is necessary. It may be either express or implied. Ordinarily, any words or conduct clearly and unequivocally indicating an intention to be bound by the contract is sufficient. Where the contract has been so far executed that the infant must be the moving party, a failure to disaffirm within a reasonable time suffices. Where the infant has received performance by the other party, and after majority deals with the thing received as being the owner of it, or where after majority he demands or accepts performance by the other party, as on the basis of a subsisting contract, there is strong evidence of ratification.

§ 105. ——. On the other hand, where the contract is wholly executory so far as the infant is concerned — where the purpose is to compel the former infant to do something merely by reason of his agreement made during infancy, especially an agreement to pay money,— and ratification since majority is relied upon to defeat his plea of infancy, very clear evidence of ratification is required. "To sustain an action against a person of full age, or a promise made by him when an infant," it is said in one case,[2] "there must be a complete ratification, either by a new promise to pay, or by positive acts of the individual, after he has been of age a reasonable time, in favor

Clark v. Van Court (1884), 100 Ind. 113, 50 Am. R. 774; American Mortgage Co. v. Wright (1893), 101 Ala. 658, 14 S. R. 399; Bestor v. Hickey (1898), 71 Conn. 181, 41 Atl. R. 555.

[1] Conklin v. Ogborn (1856), 7 Ind. 553; Jefford v. Ringgold (1844), 6 Ala. 544: American Freehold Mtg. Co. v. Dykes (1895), 111 Ala. 178, 20 S. R. 136, 56 Am. St. R. 38.

[2] Tibbets v. Garrish (1852), 25 N. H. 41, 57 Am. Dec. 307.

of his contract, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise." While this may seem a strong statement of the rule, it is fairly representative of the authorities.[1]

Passing now to the particular questions in hand, and applying these general principles here touched upon, it may be noticed, first, that —

§ 106. Sale or exchange by infants is voidable.— An infant's sale or exchange of his personal property, though accompanied by a delivery of the possession thereof, is voidable at the infant's election.[2]

§ 107. —— When may be avoided.— And, though there are some rulings to the contrary,[3] the executed sale or exchange, at least when made without fraud on his part, may, according to the great weight of authority, be avoided by him during his minority,[4] as well as within a reasonable time after he becomes of age.[5]

[1] See also Catlin v. Haddox (1882), 49 Conn. 492, 44 Am. R. 249; Turner v. Gaither (1880), 83 N. C. 357, 35 Am. R. 574; Proctor v. Sears (1862), 4 Allen (Mass.), 95; Baker v. Kennett (1873), 54 Mo. 82; Lynch v. Johnson (1896), 109 Mich. 640, 67 N. W. R. 908; Nichols & Shepard Co. v. Snyder (1900), 78 Minn. 502, 81 N. W. R. 516.

[2] Towle v. Dresser, 73 Me. 252; Stafford v. Roof, 9 Cow. (N. Y.) 626; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; State v. Plaisted, 43 N. H. 413; Chapin v. Shafer, 49 N. Y. 407; Cogley v. Cushman, 16 Minn. 397; Miller v. Smith, 26 Minn. 248, 37 Am. R. 407.

[3] As in Roof v. Stafford, 7 Cow. (N. Y.) 179, reversed in Stafford v. Roof, 9 Cow. 626; Dunton v. Brown, 31 Mich. 182 (of which it is said in note to 18 Am. St. R. 602, that the rule "is not correct on principle and has been decided to the contrary." Adams v. Beall, 67 Md. 53, 8 Atl. R. 664, 1 Am. St. R. 379); Boody v. McKenney, 23 Me. 525. *Contra*, Towle v. Dresser, 73 Me. 252.

[4] As is said in Towle v. Dresser, 73 Me. 252. "By reason of the transitory nature of personal property, to withhold this right from the infant, perhaps for a term of years, until he became of age, would, in many cases, be to make it utterly valueless." To like effect: Chapin v. Shafer, 49 N. Y. 407; Rice v. Boyer, 108 Ind. 472, 9 N. E. R. 420, 58 Am. R. 53 (citing Briggs v. McCabe, 27 Ind. 327; Indianapolis, etc. Co. v. Wilcox, 59 Ind. 429; Clark v. Van Court, 100 Ind. 113, 50 Am. R.

[5] Beardsley v. Hotchkiss, 96 N. Y. 201; Summers v. Wilson, 2 Cold. (Tenn.) 469; Chapin v. Shafer, 49 N. Y. 407.

§ 108. —— How disaffirmed.— The disaffirmance may be by express notice to that effect,[1] by action to recover the property,[2] or, particularly where the property has not yet been delivered, by some act showing unequivocally a determination not to be bound by it, as by an absolute sale to another person.[3]

§ 109. —— Necessity of restoring consideration.—Whether, upon a disaffirmance of the contract, a restitution of the consideration received for the sale is necessary, is a question upon which the authorities are much in conflict. Certain of the cases hold that such restitution, either in specie or in value, is necessary;[4] others that it is necessary in equity, but not at

774; House v. Alexander, 105 Ind. 109, 4 N. E. R. 891, 55 Am. R. 189; Hoyt v. Wilkinson, 57 Vt. 404; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Willis v. Twambly, 13 Mass. 204; Stafford v. Roof, 9 Cow. 626; Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285); Hall v. Butterfield, 59 N. H. 354, 47 Am. R. 209.

[1] Scranton v. Stewart, 52 Ind. 68; Long v. Williams, 74 Ind. 115.

[2] St. Louis, etc. Ry. Co. v. Higgins, 44 Ark. 293; Watson v. Billings, 38 Ark. 278; Sims v. Everhardt, 102 U. S. 300.

[3] Chapin v. Shafer, 49 N. Y. 407; State v. Plaisted, 43 N. H. 413; State v. Howard, 88 N. C. 650. Said Peckham, J., in Chapin v. Shafer, of the disaffirmance of a chattel mortgage: "Assuming that the mortgage is voidable only, then the mortgagor had a right to avoid it at any time before he arrived at age and within a reasonable time thereafter, by any act which evinced that purpose, and an unconditional sale of the property is such an act."

[4] In Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228, it is said: "It is well settled that if an infant has executed the contract on his part by the payment of money or the delivery of property, he cannot disaffirm the contract and recover back what he has paid, without restoring to the other party what he has received from him. Holmes v. Blogg (8 Taunt. 508), 4 Com. L. 252; Corpe v. Overton (10 Bing. 252), 25 id. 121; Farr v. Sumner, 12 Vt. 32, 36 Am. Dec. 327." To like effect: Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. R. 678 (but Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194, recognizes the exception spoken of in the true rule as given in the text). In Hall v. Butterfield, 59 N. H. 354, 47 Am. R. 209, it is said: "So they (infants) were formerly allowed to rescind and recover what they had paid on their contracts without restoring what they had received. But this has been changed, and it is now held that they cannot rescind without restoring or offering to restore the consideration, if remaining in specie and in the possession or control of the infant and capable of return; and in some jurisdictions it is now held that, where the consideration cannot be restored, the infant, before he can be allowed to rescind, must place the adult in as good condition as though he had returned the

law;[1] and still others that it is not necessary at all.[2] The true rule, however, seems to be that if, at the time of the disaffirmance, the infant still has in his possession the consideration received, he must offer to return it, and that he cannot disaffirm the contract, if, before disaffirmance, but after attaining major-

consideration, or he must account for the value of it." [Citing Carr v. Clough, 26 N. H. 289, 59 Am. Dec. 345; Heath v. West, 28 N. H. 101; Locke v. Smith, 41 id. 346; Young v. Stevens, 48 id. 133, 2 Am. R. 202; Heath v. Stevens, 48 N. H. 251; Kimball v. Bruce, 58 id. 327; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Riley v. Mallory, 33 Conn. 201.] See also Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. R. 350.

[1] Speaking of the disaffirmance of executed as distinguished from executory contracts, it is said in Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. R. 314, of the former: "Then the quondam infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. Roof v. Stafford, 7 Cow. (N. Y.) 179; Hillyer v. Bennett, 3 Edw. (N. Y.) Ch. 222; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428; Smith v. Evans, 5 Humph. (Tenn.) 70; Mustard v. Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Gratt. (Va.) 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Walsh v. Young, 110 Mass. 396; Green v. Green, 69 N. Y. 553, 25 Am. R. 233; Dill v. Bowen, 54 Ind. 204; Phillips v. Green, 5 T. B. Mon. (Ky.) 344; Goodman v. Winter, 64 Ala. 410, 38 Am. R. 13; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38."

[2] Carpenter v. Carpenter, 45 Ind. 142; White v. Branch, 51 Ind. 210; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503. In Clark v. Van Court, 100 Ind. 113, 50 Am. R. 774, the rule in that state is stated as follows: "A contract made by an infant, although executed, is, as to him, voidable (Fetrow v. Wiseman, 40 Ind. 148), and it may be avoided by him at any time during his minority, or on his arrival at full age (Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429), without returning or offering to return to the other party the property which was obtained from him under the contract. Carpenter v. Carpenter, 45 Ind. 142; Towell v. Pence, 47 Ind. 304; White v. Branch, 51 Ind. 210; Dill v. Bowen, 54 Ind. 204." See also St. Louis, etc. Ry. Co. v. Higgins, 44 Ark. 293.

ity, he has disposed of the property or thing received, or has fraudulently disposed of the consideration with a view of avoiding the necessity of a return in case of a subsequent disaffirmance. But where during infancy he has, even improvidently or carelessly, consumed, spent, lost or injured the money or thing received as the consideration, he may, notwithstanding, either before or within a reasonable time after majority, disaffirm the contract, and recover what he has parted with, although he is unable either to return what he received,[1] or to return it in as good condition as when he received it.[2]

[1] Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194, is a leading case among the earlier ones in which this rule was recognized. It is there said: "The doctrine is now well settled by the authorities that when a contract is avoided by an infant he may recover back whatever he has paid or delivered on it. If services have been rendered, he may recover in *quantum meruit* the value that his services have been upon the whole state of the case; if money or property has been paid or delivered, it can equally be recovered. Moses v. Stevens, 2 Pick. (Mass.) 332; Vent v. Osgood, 19 id. 572; Voorhees v. Wait, 15 N. J. L. 343; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Whitmarsh v. Hall, 3 Denio (N. Y.), 375. But in all such cases, as a general rule, if the infant rescinds the contract and avoids his liability upon it, he must surrender the consideration and return what he has received, for it would be unjust to permit him to recover back what he has paid or delivered and at the same time permit him to retain the fruits of the contract which he has received. Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Walker v. Ferrin, 4 id. 523; Weed v. Beebe, 21 id. 495; Hillyer v. Bennett, 3 Edw. (N. Y.) Ch. 222; Kitchen v. Lee, 11 Paige (N. Y.), 107, 42 Am. Dec. 101. This rule, however, is subject to an important qualification. A distinction is to be observed between the case of an infant in possession of such property after age and when he has lost, sold or destroyed the property during his minority. In the former case, if he has put the property out of his power, he has ratified the contract and rendered it obligatory upon him; in the latter case the property is to be restored if it be in his possession and control. If the property is not in his hands nor under his control, that obligation ceases. To say that an infant cannot recover back his property, which he has parted with under such circumstances, because by his indiscretion he has spent, consumed or injured that which he received, would be making his want of

[2] Evidence of depreciation in the value of the article to be returned by the infant is inadmissible either for the purpose of defeating a recovery, or for the purpose of reducing the damages, in an action by him to recover the consideration upon his disaffirmance of the contract. Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

§ 110. —— Right to recover from subsequent bona fide purchaser.— The right of the infant to disaffirm is, it is said, an absolute and paramount one, superior to the equities of all other persons, and, when it may be exercised at all, it may be exercised against the *bona fide* purchaser from his grantee as well as from such grantee himself.[1]

discretion the means of binding him to all his improvident contracts and deprive him of that protection which the law designed to secure to him. The authorities, we think, fully sustain this qualification of that rule. Fitts v. Hall, 9 N. H. 441; Robbins v. Eaton, 10 id. 562; Boody v. McKenney, 23 Me. 517, 525, 526; Tucker v. Moreland, 1 Am. Lead. Cas. 260."

In Craig v. Van Bebber, 100 Mo. 584, 13 S. W. R. 906, 18 Am. St. R. 569, it is said: "If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender. Tyler on Infancy (2d ed.), § 37; Green v. Green, 69 N. Y. 553, 25 Am. R. 233; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Reynolds v. McCurry, 100 Ill. 356; Brandon v. Brown, 106 Ill. 519; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Walsh v. Young, 110 Mass. 396. The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property, or consideration received, the privilege would be of no avail when most needed." (Kerr v. Bell, 44 Mo. 120; Highley v. Barron, 49 Mo. 103; and Baker v. Kennett, 54 Mo. 82, were modified.)

In Green v. Green, 69 N. Y. 553, 25 Am. R. 233 (involving a sale of land), Church, C. J., says: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. . . The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection."

Restoration not necessary where it has been dissipated during minority. Bullock v. Sprowls (1899), 93 Tex. 188, 47 L. R. A. 326, 54 S. W. R. 661; Ridgeway v. Herbert (1899), 150 Mo. 606, 51 S. W. R. 1040; American Freehold Mtg. Co. v. Dykes (1895), 111 Ala. 178, 20 S. R. 136, 56 Am. St. R. 38. But he must refund if he has it. Sanger v. Hibbard (1899), — Ind. Ter. —, 53 S. W. R. 330; Englebert v. Troxell (1894), 40 Neb. 195, 58 N. W. R. 852, 42 Am. St. R. 665.

[1] Brantley v. Wolf, 60 Miss. 420; Howard v. Simpkins, 70 Ga. 322; Hill v. Anderson, 5 Smedes & M. (Miss.) 216.

§ 111. **Chattel mortgage made by infant.**— The infant's mortgage of his chattels stands upon ground rather more advantageous to him than his sales of like property, particularly when not accompanied by a change of possession or not given for necessaries.

§ 112. —— **When avoided.**— Like his contracts of sale, his mortgage of his chattels may be avoided by him either during his infancy or within a reasonable time thereafter.[1]

§ 113. —— **Returning consideration.**— And he may do this without being bound, certainly where he has disposed of it, to return the consideration received for the mortgage.[2] If it were otherwise, if an infant "borrows money, and improvidently disposes of it, as the law from his want of discretion presumes he may do, this very indiscretion which the law endeavors to shield and protect becomes the means of fastening the imperfect obligation irrevocably upon him, and his inability to refund what he has borrowed affirms his contract to repay it with interest. It is needless to say that there is no privilege and no protection in such a rule."[3] "Under the operation of such a rule, money lenders would soon become permanently possessed of the property of infant spendthrifts, for with them the temptation to borrow for immediate gratification is generally too great to be resisted. Its adoption as a rule would be in violation of the principle of protection that underlies the whole doctrine of the law pertaining to the dealings and contracts of infants."[4]

§ 114. —— **How disaffirmed.**— The disaffirmance of the chattel mortgage may be accomplished by the same means which would suffice in case of a sale. Certainly an absolute

[1] Miller v. Smith, 26 Minn. 248, 2 N. W. R. 942, 37 Am. R. 407, citing Stafford v. Roof, 9 Cow. (N. Y.) 626; Chapin v. Shafer, 49 N. Y. 407; Randall v. Sweet, 1 Den. (N. Y.) 460.

[2] Miller v. Smith, 26 Minn. 248, 2 N. W. R. 942, 37 Am. R. 407; Corey v. Burton, 32 Mich. 30.

[3] Cooley, J., in Corey v. Burton, *supra*.

[4] Cornell, J., in Miller v. Smith, *supra*.

and unconditional sale of the mortgaged property would be clear evidence of an intention to disaffirm.[1]

§ **115. Purchases by infant, voidable when not necessaries.**— An infant's purchases of goods, not constituting what are known as necessaries,[2] are, though executed upon his part, voidable like his executed contracts of sale.[3]

§ **116. —— When may be avoided.**— And like the contract of sale, the contract of purchase may be disaffirmed by the infant either during his minority,[4] or within a reasonable time after he becomes of age.[5]

§ **117. —— How avoided.**— The methods which may be pursued are substantially the same which suffice in the case, already considered,[6] of the sale or exchange, as by notice, tender, action at law, or plea of infancy. In one case[7] an infant had purchased a horse, and sixteen days afterward tendered the horse to the seller and demanded the price paid. The seller refused to receive the horse or return the money, and the infant therefore kept the horse and brought an action for a rescission and a recovery of the money. Said the court: "We think it perfectly clear that after an infant has done all in his power to secure a rescission, and has brought suit to rescind the contract, he cannot be held to have ratified the contract because the property is still retained by him. What more he could do to evince his repudiation of the contract, or what more he could legally do toward putting it into the possession of the seller, we are at a loss to conjecture."

§ **118. —— Necessity for return of consideration.**— The same question as to the necessity of a return of the considera-

[1] Chapin v. Shafer, 49 N. Y. 407; State v. Plaisted, 43 N. H. 413; State v. Howard, 88 N. C. 650.

[2] See *post*, § 130.

[3] See *ante*, § 106.

[4] Riley v. Mallory, 33 Conn. 201; Cogley v. Cushman, 16 Minn. 397; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; Rice v. Boyer, 108 Ind. 472, 9 N. E. R. 420, 58 Am. R. 53; House v. Alexander, 105 Ind. 109, 4 N. E. R. 891, 55 Am. R. 189.

[5] See *post*, § 121; *ante*, § 107.

[6] See *ante*, § 108.

[7] House v. Alexander, 105 Ind. 109, 55 Am. R. 189, 4 N. E. R. 891.

tion arises here which arises in the case, already considered, of the infant's sale of his property.[1] And, notwithstanding like conflict in the authorities, the true rule seems to be, here as there, that the infant's failure to tender back the goods bought will defeat his right to disaffirm, only when at the time of his disaffirmance he has them in his possession or under his control, or has disposed of them after coming of age; and that where, during infancy, he has, improvidently or otherwise, lost, injured, disposed of, or consumed them, he may recover the price paid without a return of the goods,[2] even in equity.[3] Thus, where the goods have been wrongfully taken from him upon an execution against a third person, the infant is not bound to attempt their recovery in order to return them upon disaffirmance. It is enough that they have passed out of his possession and beyond his present control.[4]

[1] See *ante*, § 109.

[2] Shirk v. Shultz, 113 Ind. 571, 15 N. E. R. 12; Lemmon v. Beeman, 45 Ohio St. 505, 15 N. E. R. 476; Morse v. Ely (1891), 154 Mass. 458, 28 N. E. R. 577 [citing Chandler v. Simmons, 97 Mass. 508, 514; Bartlett v. Drake, 100 Mass. 174, 177; Walsh v. Young, 110 Mass. 396, 399; Dubé v. Beaudry, 150 Mass. 448, 23 N. E. R. 222; Boody v. McKenney, 23 Me. 517; Price v. Furman, 27 Vt. 268].

[3] In Nichol v. Steger, 6 Lea (Tenn.), 393, affirming the decree of Cooper, Ch., 2 Tenn. Ch. 328, it is said: "It is earnestly urged, however, that the infant, in a court of equity, must return the property before he can disaffirm the contract. We need but say, that where the property is in his possession, or he still has it, so that the court can compel him so to do, he will be required to return it, as one of the terms on which the court gives relief from an improvident contract, or one made by a party under the disability of infancy. But where he has parted with the property or it is destroyed, then it is impossible to administer this equity. To hold that in such a case, when the infant is sued for the price, he might defend against his liability on the contract, but is to be held responsible as for a tort in converting the property, would be practically to debar him from the plea of infancy as to his unauthorized contracts, unless he was prepared to place the vendor *in statu quo* by a return of the property. In other words, the disability of infancy would only amount to the right to rescind the contract, and if unable to comply with a necessary condition of this, that is, the return of the property, then he would always be held liable for its value. He would be liable for the value, either in contract or tort, but would have the right to rescind as the extent of his rights under the disability of infancy. We do not so understand the law."

[4] Lemmon v. Beeman, 45 Ohio St. 505, 15 N. E. R. 476.

§ 119. —— Ineffectual defenses — Recoupment — Injury to goods — Stolen money — Representation as to age. — In an action to recover the price paid the defendant cannot recoup damages for the use of the property while in the infant's possession. In a case[1] where this defense was attempted the court said: "The contract, express or implied, to pay for such use is one he is incapable of making, and his infancy would be a bar to such suit. We cannot see how the defendants can avail themselves of and enforce, by way of recoupment, a claim which they could not enforce by a direct suit."

So, that the goods have deteriorated in value, has been held to be no defense to an action to recover the price.[2] And the fact that the infant stole the money with which to buy the goods is no defense to the seller so long as the owner of the money makes no claim upon the seller.[3] Neither is it a bar to disaffirmance that the infant fraudulently represented himself to be of age, though the seller may, perhaps, have an action for the fraud.[4]

§ 120. —— Effect of disaffirmance — Not only entitles infant to restoration, but reinvests seller's title. — The effect of the disaffirmance is not only to entitle the infant to recover his money, but it also reinvests the seller with the title to the goods.[5] If, therefore, the infant disaffirms the transaction, either actively, in the case of the executed contract, as by seeking to recover the price paid; or passively, in the case of the executory contract, as by setting up the defense of infancy

[1] McCarthy v. Henderson (1885), 138 Mass. 310. See also Pyne v. Wood (1888), 145 Mass. 558, 14 N. E. R. 775, and Rice v. Butler, cited in the following note.

[2] Price v. Furman (1855), 27 Vt. 268, 65 Am. Dec. 194; Stack v. Cavanaugh (1891), 67 N. H. 149, 30 Atl. R. 350.

But in Rice v. Butler (1899), 160 N. Y. 578, 55 N. E. R. 275, 47 L. R. A. 303, it is held, denying McCarthy v. Henderson and Pyne v. Wood, *supra*, that an infant, on rescinding the purchase of a bicycle, and claiming the return of the instalments paid upon it, must account for the use and deterioration of the wheel.

[3] Riley v. Mallory, 33 Conn. 201.

[4] Carpenter v. Carpenter, 45 Ind. 142. See also Slayton v. Barry (1900), 175 Mass. 513, 56 N. E. R. 574.

[5] Shirk v. Shultz, 113 Ind. 571, 15 N. E. R. 12, and cases in next note.

when sued for the price, the other party is entitled to have back from the infant the goods sold, if in the infant's possession at the time of the disaffirmance; and, if the infant refuses to surrender them, or after disaffirmance sells, disposes of or destroys them, the seller may maintain the appropriate action either to recover the goods or their value.[1]

Chattel mortgage.— The same rule applies where the infant has given a mortgage upon the goods to secure the purchase price, or a portion thereof — he cannot avoid the mortgage and keep the goods; if he repudiates the mortgage, he repudiates the whole transaction, and the seller may recover the goods.[2]

Conditional sale.— It applies also where the infant has purchased goods upon the contract ordinarily known as a "conditional sale," *i. e.*, where the title is not to pass until payment. He cannot, by avoiding his agreement to pay, obtain an absolute title to the goods. If he disaffirms, the whole contract is at

[1] In Fitts v. Hall, 9 N. H. 441, the court say: "If, after the defendant in this case had interposed his plea of infancy and refused to perform the contract, the plaintiff had demanded the (goods), and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the count in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. In this latter case the defense of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the court said 'the basis of this contract has failed, from the fault, if not the fraud, of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff.' And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession." Vasse v. Smith, 6 Cranch (U. S.), 231; Mills v. Graham, 4 Bos. & Pul. 140. See also Walker v. Davis, 1 Gray (Mass.), 506; Heath v. West, 28 N. H. 101; Skinner v. Maxwell, 66 N. C. 45; Bennett v. McLaughlin, 13 Ill. App. 349; Carpenter v. Carpenter, 45 Ind. 142.

[2] Heath v. West, 28 N. H. 101; Skinner v. Maxwell, 66 N. C. 45.

an end, and the vendor is entitled to a restoration of his goods, and may recover them in replevin.[1]

§ 121. Ratification of purchases.— After he becomes of age,[2] though not before,[3] the infant may ratify and affirm the purchase. This he may do, either expressly, by some intentional act directed to that end, or impliedly, by so dealing with reference to the subject-matter that his affirmance may be presumed.[4] The express ratification, of course, occasions less legal difficulty than the implied.

[1] Robinson v. Berry (1899), 93 Me. 320, 45 Atl. R. 34.

[2] See *ante*, § 99.

[3] See *ante*, § 99.

[4] In Philpot v. Sandwich Mfg. Co. (1885), 18 Neb. 54, Maxwell, J., said: "After an infant has arrived at the age of twenty-one years, he may disavow or ratify any contracts not made for necessaries. In the absence of any statute providing how a contract shall be ratified, any one of three modes ordinarily will be sufficient: 1st. An express ratification. 2d. Acts which imply an affirmance. 3d. The omission to disaffirm in a reasonable time. The particular acts which constitute a ratification must necessarily depend to a great extent on the nature of the contract. When it is executed and beneficial to the infant — as where he has purchased real estate — it vests in him the freehold until he disagrees to it, and the continuance in possession until he is of age is an implied confirmation of the contract. So as to a lease. Delano v. Blake, 11 Wend. 85; Jones v. Phenix Bank, 4 Seld. 228. And an infant cannot be permitted to retain personal property purchased by him, and at the same time repudiate the contract upon which he received it. Kitchen v. Lee, 11 Paige, 107; Lynde v. Budd, 2 id. 191; Deason v. Boyd, 1 Dana, 45; Cheshire v. Barrett, 4 McCord, 241; Ottman v. Monk, 3 Sandf. 431. He who asks equity must do equity. In the case at bar the purchase was a joint one. The plaintiff, after coming of age, so far as appears, made no effort to return the property, but still retains possession. He also made payments on the notes. This we regard as a sufficient affirmance of the contract. The law which enables a party who has purchased property during infancy to disaffirm on coming of age is to be used as a shield and not as a sword — as a means by which he may be discharged from a contract which he deems prejudicial. The object is not to enable him to rob others of their property, but upon making restitution to be discharged from the contract. The fact that when Philpot made the promise, after coming of age, to pay the notes, he did not know that he was not legally liable to pay said notes, is not material in this case, and need not be considered, there being a sufficient ratification by other acts of the plaintiff. The plaintiff in error has the property, the fruit of the contract. There is no claim or charge that it was of less value than the price agreed to be paid. Honesty and fair dealing require that he should pay for the same."

What has been said in previous sections[1] of ratification generally, and especially of the necessity of a new consideration, knowledge of legal effect, and like matters, is applicable here. But, as bearing upon the subject-matter of this section, an express promise to pay for the goods, or its equivalent, will be a ratification,[2] but not a mere acknowledgment,[3] or a part pay-

[1] See *ante*, §§ 99–105.

[2] In Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307, the rule is stated thus: "Where the defense interposed is that of infancy, and a new promise is relied upon, a more stringent rule prevails than where the defense is the statute of limitations. To sustain an action against a person of full age, on a promise made by him when an infant, there must be an express ratification, either by a new promise to pay or by positive acts of the individual after he has been of age a reasonable time, in favor of his contracts, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise. Hale v. Gerrish, 8 N. H. 374; Merriam v. Wilkins, 6 id. 432, 25 Am. Dec. 472; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Goodsell v. Myers, 3 Wend. (N. Y.) 479."

In Catlin v. Haddox, 49 Conn. 492, 44 Am. R. 249, the court approve the rule laid down in Edmunds v. Mister, 58 Miss. 765, as follows: "The executory contracts of infants for the payment of money, not for necessaries, impose no legal liability upon them. . . They can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. . . . A mere acknowledgment of the debt is not sufficient, but there must be an express promise to pay, voluntarily made. . . . It stands not upon the footing of a debt barred by the statute of limitations and afterwards revived by a new promise, because in such a case there has been an always-existing, unextinguished right, since the limitation affects only the remedy and not the right; but it is rather like a

[3] In Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229, Parker, C. J., says: "By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is that a mere acknowledgment avoids the presumption of payment which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration, on his part, is necessary to defeat his power of avoiding it." See also Smith v. Mayo, 9 Mass. 62; Ford v. Phillips, 1 Pick. (Mass.) 202; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Proctor v. Sears, 4 Allen (Mass.), 95; Wilcox v. Roath, 12 Conn. 550; Edgerly v. Shaw, 5 Fost. (N. H.) 514, 57 Am. Dec. 349; Conklin v. Ogborn, 7 Ind. 553; Reed v. Boshears, 4 Sneed (Tenn.), 118; Turner v. Gaither, 83 N. C. 357, 35 Am. R. 574; Alexander v. Hutchison, 2 Hawks (N. C.), 535.

ment,[1] except *pro tanto*. So the retention of the property, without disaffirmance, for an unreasonable time after becoming of age,[2] and, *a fortiori*, such a retention coupled with clear acts of ownership, as the mortgaging or selling the property as his own,[3] will amount to a ratification.

debt wiped out by a discharge in bankruptcy."

In Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229, Parker, C. J., says: "All that is necessary is that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of part of the money due or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his contract." See also Baker v. Kennett, 54 Mo. 82; Hatch v. Hatch, 60 Vt. 160; Henry v. Root, 33 N. Y. 526.

A mere offer to submit to arbitration is not a ratification (Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358); nor is an offer to compromise (Martin v. Byrom, Dud. (Ga.) 203; Bennett v. Collins, 52 Conn. 1); nor a mere declaration, to a stranger, of an intention to perform. Hoit v. Underhill, 10 N. H. 220, 32 Am. Dec. 380.

Where the affirmance is conditional it cannot be extended beyond the limits fixed by the conditions. Minock v. Shortridge, 21 Mich. 304. Thus, if the promise is to pay when able, the plaintiff must show ability to pay. Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325. See also Proctor v. Sears, 4 Allen (Mass.), 95; Everson v. Carpenter, 17 Wend. (N. Y.) 419; Chandler v. Glover, 32 Pa. St. 509.

[1] Catlin v. Haddox, 49 Conn. 492, 44 Am. R. 249; Robbins v. Eaton, 10 N. H. 561. In the latter case it is said: "Payment of part of a note is no ratification of the whole because the infant may admit only an indebtedness to that extent. The ratification should be equivalent to a new contract. Therefore an express promise as to the whole debt is necessary. There are numerous authorities to this effect, but there are cases where notes were given for articles which had been used or consumed prior to the infant's becoming of age. Where the matter constituting the consideration of the note is not in existence when the infant becomes of age, or is wholly beyond his control, there is nothing upon which an implied promise can arise, and an express promise to pay the debt can alone render the infant liable. . . . But where the consideration of the notes is still in existence, in as perfect a state after the infant becomes of age as before, and is subject to his control, he may so deal with the articles or property forming such consideration as to raise an implied promise of payment."

[2] Boyden v. Boyden, 9 Metc. (Mass.) 519; McKamy v. Cooper, 81 Ga. 679; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Aldrich v. Grimes, 10 N. H. 194; Philpot v. Sandwich Mfg. Co., 18 Neb. 54, 24 N. W. R. 428.

[3] Thus, retaining, using, and finally selling, after maturity, a horse purchased during infancy affirms the purchase. Cheshire v. Barrett, 4 McCord (S. C.), 241, 17 Am. Dec. 735. To same effect: Lawson v. Lovejoy, 8 Greenl. (Me.) 405, 23 Am. Dec. 526;

§ 122. Liability of infant for necessaries.— Notwithstanding the infant's general inability to bind himself by contracts it is well settled that he is liable for necessaries furnished to him. Whether his liability is to be deemed based upon his express contract, or only upon a contract created or implied by law, is a question of some importance upon which writers and judges are not agreed. Mr. Bishop[1] asserts the latter, saying: "The books often speak of this contract as though it were an express one, which the law authorizes the infant to make; but the doctrine is universal that the measure of his liability is the value of the necessaries, not what he promised to pay for them,[2] so there is no propriety in designating the undertaking as express, for it is what the law and not the infant has made it."[3] On the other hand, it has been said by the court in Texas:[4] "We apprehend the better doctrine to be that an infant may make an express written contract for necessaries upon which he may be sued, but that, by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessaries received by him. It is to his benefit to hold the express contract not void, but voidable;

Boyden v. Boyden, 9 Metc. (Mass.) 519; Boody v. McKenney, 23 Me. 517; Chapin v. Shafer, 49 N. Y. 407; Robbins v. Eaton, 10 N. H. 561; Curry v. St. John Plow Co., 55 Ill. App. 82; American Freehold Mtg. Co. v. Dykes (1895), 111 Ala. 178, 20 S. R. 136, 56 Am. St. R. 38.

So in Hilton v. Shepherd (1898), 92 Me. 160, 42 Atl. R. 387, it appeared that an infant bought horses for which he gave his note and other considerations. After he became of age, he first used the horses in his business, and then sold them as his own. In a suit brought by him to recover the consideration paid, he claimed that he had rescinded the sale,— but prior to his use and sale of the horses. *Held*, that his conduct in the use and sale of the horses was not only an abandonment of the attempted rescission, but a ratification of the original bargain.

[1] Bishop on Contracts, § 908.

[2] Citing Hyer v. Hyatt, 3 Cranch (U. S. C. C.), 276; 12 Fed. Cas. No. 6977; Commonwealth v. Hantz, 2 Pa. (P. & W.) 333; Morton v. Steward, 5 Ill. App. 533; Bouchell v. Clary, 3 Brev. 194; Fairmount, etc. Ry. Co. v. Stutler, 54 Pa. St. 375, 93 Am. Dec. 714.

[3] Citing Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Earle v. Reed, 10 Metc. (Mass.) 387; Gay v. Ballou, 4 Wend. (N. Y.) 403. 21 Am. Dec. 158; Hyman v. Cain, 3 Jones (N. C.), 111; Robinson v. Weeks, 56 Me. 102.

[4] Askey v. Williams, 74 Tex. 294. See also Bradley v. Pratt, 23 Vt. 378.

for if it be voidable merely he can secure the advantage of a good bargain, and may relieve himself of it if it be a bad one, while, on the other hand, to hold it void would deprive him of the benefit of an advantageous contract."

But whatever be the theory upon which the rule is based, the rule itself is one established, like the general rule of non-liability, for the infant's benefit and advantage; for if he could not become bound for necessaries, he might be left to suffer for the want of those things which were indispensable to his life or safety, notwithstanding that he had certain future means of payment.

§ **123.** —— **For what amount and how bound — Liability on notes, bonds, etc.**— An infant, in purchasing necessaries, may make an express contract to pay for them, but such a promise is not indispensable. "An infant is liable for necessaries in the same manner as an adult is liable; and his contract or promise to pay is to be established in the same manner."[1] The promise to pay may therefore be implied. So, the amount to be paid may be expressly agreed upon, but, if not, the law will require the payment of the reasonable value; and, if it be expressly agreed upon, the law will require the payment of the reasonable value only, though the agreed amount was more.[2] Where the promise is express, and particularly where the amount to be paid is expressly agreed upon, some questions of difficulty present themselves. These usually have arisen where the contract of payment was in writing, as where the infant had given his note or bond for the amount.

§ **124.** ——. It being entirely established that, whatever his contract, the infant can be held only for the reasonable value of the goods, the questions at once arise, Is his express promise, per-

[1] Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158.

[2] Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Vent v. Osgood, 19 Pick. 572, 575; Gay v. Ballou, *supra;* Parsons v. Keys, 43 Tex. 557; Hyman v. Cain, 3 Jones (N. C.), 111; Locke v. Smith, 41 N. H. 346; Beeler v. Young, 1 Bibb (Ky.), 519; Guthrie v. Morris, 22 Ark. 411; Bradley v. Pratt, 23 Vt. 378; Earle v. Reed, 10 Metc. (Mass.) 387; Ayers v. Burns (1882), 87 Ind. 245.

haps in writing, stipulating for a fixed sum, absolutely void, or voidable only as to the amount agreed upon? and, Is the infant to be held for the reasonable value on the express contract modified to this extent, or only upon the contract implied or created by law, the express contract being ignored? Upon these questions the courts are not entirely agreed, but the true rule seems to be that which is well stated by Mr. Parsons[1] as follows: "He cannot contract to pay even for necessaries, in such wise as to bar an inquiry into the price and value. The law permits persons to supply him with necessaries, and have a valid claim against him therefor, for their fair worth; but it does not permit them to make a bargain with him as to the price which shall bind him absolutely, because it does not permit him to determine this price for himself by reason of his presumed inability to take proper care of his own interests; but the value and the price may be determined by a jury. And a seal to the instrument would give it no additional force in this respect, but the infant would still be bound only for a fair value. For the same reason an infant cannot be bound for the amount in an account stated;[2] nor for the sum mentioned in his note, although given for necessaries;[3] nor for the amount due on his bond, for the ancient distinction which held him on a bond without a penalty, but not a bond with a penalty, would probably be now disregarded.[4] If, however, an infant gives

[1] Parsons on Contracts, vol. I, p. *313.

[2] Citing Ingledew v. Douglas, 2 Stark. (Eng.) 36; Trueman v. Hurst, 1 T. R. (Eng.) 40; Hedgley v. Holt, 4 C. & P. (Eng.) 104; Oliver v. Woodroffe, 4 M. & W. (Eng.) 650; Williams v. Moor, 11 id. 256; Beeler v. Young, 1 Bibb (Ky.), 519.

[3] Citing McCrillis v. How, 3 N. H. 348; Bouchell v. Clary, 3 Brev. (S. C.) 194; Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33; Fenton v. White, 1 South. (N. J.) 100; McMinn v. Richmonds, 6 Yerg. (Tenn.) 9; Hanks v. Deal, 3 McCord (S. C.), 257. "Some of these cases declare an infant's note, though given for necessaries, *void*, but it is conceived they mean voidable only, and not that such note is not susceptible of ratification."

[4] "The older cases," says Mr. Parsons in his note, "hold that an infant's bond, at least if given *with a penalty*, is absolutely *void*, not voidable merely, although given for necessaries. Ayliff v. Archdale, Cro. Eliz. (Eng.) 920; Fisher v. Mowbray, 8 East (Eng.), 330; Baylis v. Dinely, 3 M. & Sel. (Eng.) 447; Hunter v.

his note, his bond, or any other instrument, for necessaries, he may be sued upon the instrument, but the plaintiff shall recover only the value of the necessaries."[1]

This rule preserves to the infant the benefit of the contract, if any, as where he has secured favorable terms or a low price,— as to which the adult seller will be bound,— while protecting him, if he has made a bad bargain, against the consequences of his own indiscretion.[3]

Agnew, 1 Fox & S. (Ire.) 15; Allen v. Minor, 2 Call (Va.), 70; Colcock v. Ferguson, 3 Desaus. (S. C.) 482. It is conceived, however, that in this country, bonds, like other contracts, are only voidable, and may be ratified. Conroe v. Birdsall, 1 Johns. (N. Y.) Cas. 127 (1 Am. Dec. 105). The marginal note to this case erroneously uses the word *void* in relation to such bond; the court said it was only voidable."

[1] Citing Earle v. Reed, 10 Metc. (Mass.) 387; Dubose v. Wheddon, 4 McCord (S. C.), 221.

[2] In Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654, Shaw, Ch. J., says: "Most of the cases where it has been decided that a minor cannot be held on his express contract for necessaries are those where the action is founded on the express obligation, and where, from the form of the action, the consideration cannot be inquired into. As, an action on a bond with a penalty, which implies a consideration, and where an inquiry into the consideration is precluded by the forms of pleading and proof. So on an *insimul computassent*, where the action is founded upon the act of accounting and the admission of the balance, and no further inquiry into the consideration and terms of the contract can be gone into. These actions are founded on the assumption that the party has full power to bind himself by any lawful contract, and they only open the question whether he has so bound himself. But in the other forms of obligation and of action, and where it can always be open to inquiry what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may as well be bound by an express as by an implied contract for necessaries. This is often beneficial to the minor, and enables him to avail himself of any stipulations in his favor. If such an express contract should be held to be wholly void, and the party furnishing the minor with necessaries should be remitted to his action on the implied contract, he would recover upon a *quantum valebant* or *quantum meruit*, though above the stipulated prices. The rule as above qualified, that the minor shall only be bound by such a species of express contract, and in such a form of action, as leaves the nature, terms and consideration of the contract open to inquiry, and then only by such a contract as shall appear at the time to have been fair, reasonable and beneficial to the minor, affords a sufficient security to the rights of minors."

§ 125. —— **Interest.**— Where the infant is held chargeable upon his note for necessaries, interest may be allowed on the amount due.[1]

§ 126. —— **Goods must have been furnished on infant's account and at his request.**— While an express contract is not necessary, and the infant may be charged upon an implied agreement to pay, it is still essential that the goods should have been furnished on the infant's account, upon his credit, and at his request, either express or implied. If, therefore, the goods, though supplied for the infant, were furnished in reliance upon the credit of his parent, guardian or other third person, the infant is not liable,[2] in the absence of a sufficient ratification or promise by him after he arrives at maturity.[3] The fact that the parent or other person upon whose credit the goods were furnished is too poor to be able to pay for them himself, does not render the infant liable.[4]

§ 127. —— **Infant not liable if already supplied.**— If the needs of the infant are already supplied from any source, then he is not liable, on the ground of necessaries, for further goods furnished, notwithstanding that the goods were such as would, in the absence of such a previous supply, have been properly regarded as necessaries.[5] It is immaterial from what source the necessaries have come, if the infant be actually supplied.[6]

[1] Bradley v. Pratt, 23 Vt. 378.

[2] Duncomb v. Tickridge, Aleyn, 94; Simms v. Norris, 5 Ala. 42; Hoyt v. Casey, 114 Mass. 397, 19 Am. R. 371.

[3] See Hoyt v. Casey, *supra.*

[4] Hoyt v. Casey, *supra.*

[5] Bainbridge v. Pickering, 2 W. Black. 1325; Ford v. Fothergill, Peake, N. P. 229; Brayshaw v. Eaton, 5 Bing. N. C. 231; Cook v. Deaton, 3 Car. & P. 114; Barnes v. Toye, L. R. 13 Q. B. Div. 410; Johnstone v. Marks, 19 id. 509; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Hull v. Connolly, 3 McCord (S. C.), 6, 15 Am. Dec. 612; Guthrie v. Murphy, 4 Watts (Pa.), 80, 28 Am. Dec. 681; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Kline v. L'Amoureux, 2 Paige (N. Y.), 419, 22 Am. Dec. 652; Hoyt v. Casey, 114 Mass. 397, 19 Am. R. 371; Decell v Lewenthal, 57 Miss. 331, 34 Am. R. 449; Trainer v. Trumbull, 141 Mass. 527. 6 N. E. R. 761; Nichol v. Steger, 2 Tenn. Ch. 328; affirmed, 6 Lea (Tenn.), 593.

[6] In Burghart v. Angerstein, 6 Car. & P. 690, Baron Alderson said: "If a minor is supplied, no matter from what quarter, with necessaries suit-

If he be partly supplied, then the additional goods can be deemed necessaries only so far as they supply the need not provided for.[1] The mere fact, however, that the infant has an income sufficient to enable him to supply himself with necessaries will not defeat a recovery if he was not in fact supplied.[2] Where, however, the infant has been furnished with money for the purpose of supplying himself with necessaries, the creditor must, it is said, take the burden of showing that the infant has not supplied himself.[3]

§ 128. —— **Seller supplies goods at his peril.** — A person who supplies goods to an infant on his account as necessaries does so at his peril, taking upon himself the risk of being able to prove that they were in fact necessaries.[4] Mere inquiry or reasonable belief will not protect him; for, notwithstanding this, it becomes always a question of fact whether the goods were necessaries or not, and if they were not, the seller must fail, however diligent his inquiries may have been.[5]

able to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after."

[1] So, no recovery can be had for goods, proper in kind, but excessive in quantity. Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

[2] Burghart v. Hall, Mees. & W. 727.

[3] Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274; Nicholson v. Wilborn, 13 Ga. 467.

[4] Barnes v. Toye, L. R. 13 Q. B. Div. 410; Brayshaw v. Eaton, 5 Bing. N. C. 231; Cook v. Deaton, 3 Car. & P. 114; Burghart v. Angerstein, 6 id. 690. In Trainer v. Trumbull (1886), 141 Mass. 527, 6 N. E. R. 761, the court said that the question whether the articles furnished were necessaries or not "must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied. Angel v. McLellan, 16 Mass. 28; Swift v. Bennett, 10 Cush. 436; Davis v. Caldwell, 12 Cush. 512; Barnes v. Toye, 13 Q. B. Div. 410."

[5] In Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542, Gibson, C. J., says: "In Ford v. Fothergill, 1 Esp. 211; s. c., Peake's N. P. Cas. 299, Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parents or friends. That case may be thought to have been shaken in Dalton *v.* Gib, 5 Bing. N. Cas. 198, in which it was held that inquiry is not a condition precedent

§ 129. —— **Infant living with parents or having a guardian presumed to be supplied.**— Where the infant lives with his parents, or is supported by them, or where he has a guardian, the presumption is that his parents or guardian have supplied his needs. Although the goods are to be paid for out of the infant's estate, yet the parent or the guardian, and the former particularly, is, within reasonable limits, entitled to determine what is suitable and desirable for the infant to have;[1] and if it appears that he has supplied the infant with such articles as he regards as suitable and sufficient,[2] or has furnished the infant with money to procure them,[3] the third person who

to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in Brayshaw v. Eaton, id. 231, this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of nonsuit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed." See also Trainer v. Trumbull, 141 Mass. 527, *supra;* Nichol v. Steger, 6 Lea (Tenn.), 393; Kline v. L'Amoureux, 2 Paige (N. Y.), 419, 22 Am. Dec. 652.

[1] See Hoyt v. Casey, 114 Mass. 397, 19 Am. R. 371; Hull v. Connolly, 3 McC. (S. C.) 6, 15 Am. Dec. 612; Bainbridge v. Pickering, 2 W. Black. 1325.

[2] Hull v. Connolly, *supra;* Freeman v. Bridger, 4 Jones (N. C.), L. 1, 67 Am. Dec. 258; Perrin v. Wilson, 10 Mo. 451.

[3] Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274; Nicholson v. Wilborn, 13 Ga. 467.

In Rivers v. Gregg, *supra*, it is said: "The general rule certainly is that an infant is bound by his contract for necessaries. But there are exceptions equally clear and well settled. *Necessaries*, when the term is applied to an infant, are those things that are conducive and fairly proper for his comfortable support and education, according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation. But what are necessaries? Meat, lodging, clothing, and education, if the means admit of it, certainly fall within the definition. To which may be added, in case of marriage, the support of wife, children and servants. All is relative and is regulated by circumstances. But if an infant is furnished with these things by his parent or guardian, then the same articles, to the same or a less amount, supplied by another under contract, are not necessary to him. To another, not so supplied, they would be necessary. The same remarks apply, with equal

would charge the infant for other things as necessaries must be prepared to prove that they were such.

This rule does not make the fact of the infant's living with his parents or having a guardian the absolute criterion, or make the parent or guardian the sole judge, or justify him in

propriety and force, where the infant is supplied by parent or guardian, or by this court, with money to furnish himself with necessaries. In some cases circumstances make it proper, and imperatively demand, that the infant should have the disbursement of his allowance himself. In the case of marriage and housekeeping the perpetual recurring wants and exigencies of the family render it impossible that the guardian should always be called on to supervise the disbursement of the fund allowed to the infant. Or if, being a youth of fortune, he is sent upon his travels in foreign lands, or even in his own country, the guardian cannot look to the expenditure of the money. It is necessarily intrusted to his own keeping. The brother of the deceased is now abroad on his European travels. Previous to his departure an application was made to this court for a proper allowance to defray his traveling expenses. The court, upon due consideration, made an order for what was supposed to be a proper allowance, reference being had to the amount of his fortune. Supposing this young gentleman should expend his allowance, and in addition should contract debts to the same amount for articles that, *prima facie*, would be regarded as necessaries! Could these claims be supported on its being shown that the infant had an allowance that was amply sufficient to defray all his necessary and proper expenses? I suppose not.

"He who deals with an infant is presumed to know of his infancy. He is bound, at his own peril, to make the inquiry. It makes no difference whether the inquiries result in correct information or the reverse. It is no excuse if he honestly supposed from his appearance or other circumstances that the infant was an adult. The protection of this defenseless class of persons would be very inadequate if this principle is not further extended. The only safe rule for the security of infants and their estates is that he who credits the infant for necessaries should be bound to know whether the infant has been supplied with a sufficient amount of those articles by the parent or guardian, or from some other source. The consequence, if any other rule than this prevails, would be, that an infant's estate might be made liable for double the amount of necessaries that were necessary for him.

"I will not say that an infant, after being supplied with necessaries, or a proper allowance in cash to procure them, may not, under some circumstances, be liable on a contract for necessaries. Suppose, for example, after being furnished with all things necessary for him, he should give them away, or sell them, or waste the proceeds in riot and debauchery. Or suppose, that after having placed in his hands, in money, an allowance

leaving the infant to suffer,[1] but it affords a presumption, generally well founded, which the person who supplies more goods must rebut.

The same presumption arises where the infant lives with his mother, though the latter be not under the same legal duty to support the infant that the father would be.[2]

The presumption also arises, and the same rule applies, notwithstanding the mere fact that the father is poor, unless it also appears that he has refused or neglected to provide for the infant.[3]

sufficient for all his wants, he should be robbed of it, or should lose it by accident or at games of chance. Then the infant would be reduced to want for the means of bare subsistence. Must he starve with a plenty in his coffers? Would he not be bound by a contract for necessaries under these circumstances? This is stating the strongest imaginable case against the rule. But its wisdom is still manifest. In a case like that supposed, I would say that the infant would be bound. But I would further say that the party who alleged this extraordinary state of facts must prove them. In other words, when it is shown that an infant is supplied with necessaries by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and of reason must be, that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was in a state of destitution, must take upon himself the burthen of proving the allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then it should be limited to bare necessaries, and should not be allowed to embrace articles of luxury, which would otherwise be suitable to the infant's fortune and condition in life."

[1] In Trainer *v.* Trumbull (1886), 141 Mass. 527, 6 N. E. R. 761, the defendant was a minor who had an expectant estate of about $10,000 accruing upon his father's death. His father was an inmate of a soldiers' home, his mother had been committed to a reformatory institution, and the defendant himself was in an almshouse and was in a diseased and sickly condition. Defendant had a guardian, but the guardian did nothing for his support. The plaintiff, at the request of defendant's father, and in reliance upon defendant's expectancy, took defendant from the almshouse to his own home, and cared for and educated him until the father's death, when she brought an action to recover for the supplies furnished. The defense was that as defendant was supplied at the almshouse with necessaries according to his then position in life, that of a pauper, the supplies furnished by plaintiff were not necessaries. But the court held otherwise.

[2] Hull v. Connolly, 3 McC. (S. C.) 6, 15 Am. Dec. 612. See also Atchison v. Bruff, 50 Barb. (N. Y.) 381.

[3] Hoyt v. Casey, 114 Mass. 397, 19

§ 130. What constitute necessaries.—The term "necessaries" is a relative one, and no arbitrary or inflexible rule can be laid down for determining whether any given article falls within its meaning or not.[1] The most comprehensive statement is that the term includes those things which are suitable and proper for the reasonable comfort, subsistence and education of the particular infant, taking into consideration his circumstances and condition in life.[2] It therefore clearly is not to be confined in its meaning to those things which are absolutely in-

Am. R. 371. In this case it is said: "We are of the opinion that the instruction to the jury that the poverty of the father would not be sufficient to render the son liable for necessaries furnished to him, but that the plaintiff must go further and show a refusal or neglect of the father to furnish them, was sufficiently favorable to the plaintiff. An infant when residing at home, and under the care of his father and supported by him, is not liable even for necessaries. If he were, the father would be deprived of his right to determine what the character of that support should be. Bainbridge v. Pickering, 2 W. Bl. 1325, 1 Esp. N. P. 163; Wailing v. Toll, 9 Johns. 141; Angel v. McLellan, 16 Mass. 28. Nor do we think that a case can be excepted from this well-recognized principle because the father is found to be a poor man. When necessary professional services are rendered to a minor son residing in the house of his father, the legal inference is that the father is the person liable therefor. In the present case the father was keeping a family together, and was receiving the wages of this minor. While it was proved that he was unable to pay the debts he had incurred, he was, so far as it appeared, doing his best with the means at his command to provide for his family. No refusal or neglect to perform his duty of supporting the son was shown, although from his impoverished condition it may perhaps be fairly inferred that such duty could be but imperfectly performed. Ordinarily when one renders to another valuable service, the law will imply a promise to pay therefor by him for whom such service is rendered, and this upon the ground that as such party cannot infer service of this character to be gratuitous, it must be implied that he promised to pay for it; but no such implication can arise against a minor residing with his father, delivering over to him his wages, and entitled to look to him for support."

[1] Epperson v. Nugent, 57 Miss. 45, 34 Am. R. 434.

[2] Burghart v. Angerstein, 6 C. & P. 690; Dalton v. Gib, 7 Scott, 117; Peters v. Fleming, 6 M. & W. 42; Ryder v. Wombwell, L. R. 4 Ex. 32; Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274; Epperson v. Nugent, *supra;* Davis v. Caldwell, 12 Cush. (Mass.) 512; Nicholson v. Spencer, 11 Ga. 607; Jordan v. Coffield, 70 N. C. 110; Strong v. Foote, 42 Conn. 203.

dispensable to the support of life,[1] but it extends to those articles which are suitable and proper to maintain the infant in that state, station and degree of life in which he is placed. Articles of comfort and convenience may therefore, in some cases, be deemed necessaries, and, in some cases perhaps, things purely ornamental.[2] "Articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed."[3]

The term, however, it is said, includes those things only which are personal to the infant,[4] and does not ordinarily include such things, however desirable or beneficial, as pertain only to his property or estate.[5] For matters of the latter sort the intervention of a guardian is usually held requisite, though some cases have extended the rule to include those things also which are necessary for the preservation of his estate.[6]

Fuller illustrations of the application of the rules will be found in a later section.

§ 131. —— How question determined — Burden of proof. The question whether the goods in controversy in any case fall under the head of necessaries, is usually one of mixed law and fact, and, as to the respective provinces of the court and jury, the rule has been laid down as follows: "The court determines whether the articles furnished fall within the class

[1] Peters v. Fleming, *supra*, per Parke, B.

[2] Ryder v. Wombwell, *supra*, per Willes, J.

[3] Chapple v. Cooper, 13 Mees. & W. (Eng.) 252, per Alderson, B.

[4] Thus in Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704, Dewey, J., says: "The wants to be supplied are, however, personal: either those of the body, as food, clothing, lodging, and the like; or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood."

[5] See, as to this, Turner v. Gaither, 83 N. C. 357, 35 Am. R. 574; Tupper v. Cadwell, *supra;* Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537; Mathes v. Dobschuetz, 72 Ill. 438; Price v. Sanders, 60 Ind. 310.

[6] See, as to this, Epperson v. Nugent, 57 Miss. 45, 34 Am. R. 434; Dillon v. Bowles, 77 Mo. 603.

Mr. Bishop says the other rule is "contrary to reason." Contracts, § 911.

of necessaries suitable to any one (infant or adult) in the defendant's situation and condition of life; and if the court decides that they do come within the class, the jury are to decide whether the particular articles furnished were actually necessary under the circumstances of the case."[1] The court quote, with approval, the rule as laid down by Bibb, C. J., as follows: "Whether the articles are of those classes for which an infant shall be bound to pay is matter of law to be judged of by the court; if they fall under those general descriptions, then, whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable prices, must regularly be left to the jury as matter of fact."[2]

As to the burden of proof something has been already seen,[3] and, in general, the burden of proving that the goods were such necessaries that the infant might bind himself to pay for them is upon the plaintiff.[4]

§ 132. —— Illustrations of what are necessaries or not. Lord Coke laid down the rule that "An infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards."[5] Clearly, within the rules already laid down, food is a necessary,[6] and board, as while attending school.[7] Entertainment at an inn may also be,[8] but not, ordinarily, are dinners, confectionery and fruit furnished to a student in college,[9]

[1] Decell v. Lewenthal, 57 Miss. 331, 34 Am. R. 449.

[2] Beeler v. Young, 1 Bibb (Ky.), 519. See also Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Grace v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; Jordan v. Coffield, 70 N. C. 110; Garr v. Haskett, 86 Ind. 373; Ayers v. Burns, 87 Ind. 245; McKanna v. Merry, 61 Ill. 177; Bent v. Manning, 10 Vt. 225.

[3] See *ante*, § 128.

[4] Wood v. Losey, 50 Mich. 475, 15 N. W. R. 557; Thrall v. Wright, 38 Vt. 494; Nicholson v. Wilborn, 13 Ga. 467.

[5] Coke, Lit. 172*a*.

[6] Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274.

[7] Kilgore v. Rich, 83 Me. 305, 23 Am. St. R. 780, 12 L. R. A. 859, 22 Atl. R. 176.

[8] See Watson v. Cross, 2 Duvall (Ky.), 147.

[9] Brooker v. Scott, 11 M. & W. 67.

though fruit or other like articles might be in case of illness.[1]

Medical attendance,[2] nursing in sickness,[3] and dental services[4] fall within the list of necessaries, and so do proper lodgings,[5] though, ordinarily, repairs upon his dwelling-house,[6] and labor and material for the erection[7] of a dwelling or insurance upon it,[8] do not.

A common school education is necessary,[9] but not usually a college education;[10] nor, it is held, can a professional education be regarded as necessary,[11] though this may be questionable.

Suitable clothing,[12] in reasonable quantities,[13] is necessary, but not when extravagant in kind or excessive in quantity. In proper circumstances, livery for the infant's servant may be included,[14] and, in perilous times, regimentals for the infant himself,[15] but not cockades for the soldiers of the company of which he is captain.[16] Wedding garments may also be necessary for the infant's marriage.[17]

[1] Wharton v. Mackenzie, 5 Q. B. 606.

[2] See Hoyt v. Casey, 114 Mass. 397, 19 Am. R. 371; Wailing v. Toll. 9 Johns. (N. Y.) 141; Saunders v. Ott, 1 McCord (S. C.), 572; Price v. Saunders, 60 Ind. 310.

[3] Werner's Appeal, 91 Pa. St. 222.

[4] Strong v. Foote, 42 Conn. 203.

[5] See Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274, 278; Price v. Sanders, 60 Ind. 310, 314.

[6] Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Wallis v. Bardwell, 126 Mass. 366; Phillips v. Lloyd (1892), 18 R. I. 99, 25 Atl. R. 909.

[7] Freeman v. Bridger, 4 Jones (N. C.), L. 1, 67 Am. Dec. 258; Price v. Sanders, 60 Ind. 310; Wornock v. Loar (Ky.), 11 S. W. R. 438; Allen v. Lardner (1894), 78 Hun (N. Y.), 603.

[8] New Hampshire Ins. Co. v. Noyes, 32 N. H. 345.

[9] See Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537.

[10] Middlebury College v. Chandler, *supra*.

[11] Turner v. Gaither, 83 N. C. 357, 35 Am. R. 574. In Walter v. Everard, [1891] 2 Q. B. 369, instruction in the business of a farmer, auctioneer and valuer were held to be necessaries.

[12] Chapple v. Cooper, 13 M. & W. 252; Maddox v. Miller, 1 M. & S. 738; Barnes v. Toye, 13 Q. B. Div. 410; Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; Anderson v. Smith, 33 Md. 465; Lynch v. Johnson (1894), 109 Mich. 640, 67 N. W. R. 908.

[13] Johnson v. Lines, 6 W. & S. (Pa.) 80, 40 Am. Dec. 542.

[14] Hands v. Slaney, 8 T. R. 578.

[15] Coates v. Wilson, 5 Esp. 152.

[16] Hands v. Slaney, *supra*.

[17] Jordan v. Coffield, 70 N. C. 110; Garr v. Haskett, 86 Ind. 373.

Jewelry, ornaments[1] and watches[2] are not ordinarily necessaries, though under proper circumstances a watch may be;[3] and jewelry intended as a gift to the betrothed wife of an infant of large fortune has been regarded as necessary.[4] Horses purchased for business[5] or pleasure,[6] and their keep,[7] are not necessaries, though it may be otherwise if an infant has medical advice to take exercise on horseback;[8] nor are racing-jackets (unless the infant be a jockey),[9] or betting-books.[10] In case the horse was necessary, the horse accoutrements might be necessary also.[11] Traveling for pleasure is not a necessary,[12] though traveling for health might be. Carriages[13] and bicycles[14] are not ordinarily necessaries, though in special cases either, like the horse, might be considered so. Tobacco, pipes and cigars are not necessaries;[15] neither are "liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings," etc.[16]

Goods for use in business,[17] supplies for farming,[18] a horse to

[1] Ryder v. Wombwell, L. R. 4 Ex. 32.

[2] Berolles v. Ramsay, Holt, N. P. 77.

[3] See Barnes v. Toye, 13 Q. B. Div. 410, 414; Peters v. Fleming, 6 M. & W. 42.

[4] Jenner v. Walker, 19 L. T. (N. S.) 398.

[5] Rainwater v. Durham, 2 N. & McC. 524, 10 Am. Dec. 637; Grace v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; House v. Alexander, 105 Ind. 109, 4 N. E. R. 891, 55 Am. R. 189; Beeler v. Young, 1 Bibb (Ky.), 519.

[6] See House v. Alexander, and other cases in preceding note.

[7] Merriam v. Cunningham, 11 Cush. (Mass.) 40.

[8] Hart v. Prater, 1 Jur. 623.

[9] Burghart v. Angerstein, 6 Car. & P. 690, 698.

[10] Jenner v. Walker, 19 L. T. (N. S.) 398.

[11] See Hill v. Arbon, 34 L. T. (N. S.) 125.

[12] McKanna v. Merry, 61 Ill. 177.

[13] Howard v. Simpkins, 70 Ga. 322.

[14] Pyne v. Wood (1888), 145 Mass. 558, 14 N. E. R. 775. In this case the infant lived at home but worked in a shop a mile away, and used the bicycle to ride upon in going home to dinner, which he could not do in the time allotted without it. (The court cite Merriam v. Cunningham, 11 Cush. (Mass.) 40; Leonard v. Stott, 108 Mass. 46.) To same effect see Clyde Cycle Co. v. Hargreaves (1898), 78 L. T. (N. S.) 296. See also Rice v. Butler (1899), 160 N. Y. 578, 55 N. E. R. 275, 47 L. R. A. 303.

[15] Bryant v. Richardson, 12 Jur. (N. S.) 300.

[16] Saunders v. Ott, 1 McCord (S. C.), 572; Price v. Sanders, 60 Ind. 310; House v. Alexander, 105 Ind. 109, 55 Am. R. 189, 4 N. E. R. 891.

[17] House v. Alexander, 105 Ind. 109, 4 N. E. R. 891, 55 Am. R. 189; Grace

[18] Decell v. Lewenthal, 57 Miss. 331, 34 Am. R. 449; State v. Howard, 88 N. C. 650.

be used in cultivating his land,[1] the keep of work-horses,[2] even though in either case he thereby earns his living, are not considered as necessaries.

Money borrowed to be used, and used by the infant in procuring necessaries, is not a necessary,[3] but money directly applied by the lender to procure necessaries for the infant may be recovered;[4] and so, it is held, may money advanced by a third person, at the infant's request, to pay a bill previously incurred by the infant for necessaries.[5] On the same ground, a person who signs, as surety, an infant's note for necessaries and is compelled to pay it, may recover from the infant as for money paid for his benefit.[6]

Necessaries furnished to the infant's wife and family are necessaries to the infant;[7] and an infant's widow has been held liable on her contract to pay the funeral expenses of her husband who left no estate.[8]

Attorney and counsel fees are usually regarded as necessaries when required to preserve or protect the infant's personal rights.[9] When rights of property only are involved, it has been

v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; Decell v. Lewenthal, 57 Miss. 331, 34 Am. R. 449; Rainwater v. Durham, 2 N. & McC. 524, 10 Am. Dec. 637; Ryan v. Smith (1896), 165 Mass. 303, 43 N. E. R. 109; Paul v. Smith, 41 Mo. App. 275; Wood v. Losey, 50 Mich. 475, 15 N. W. R. 557.

[1] House v. Alexander, 105 Ind. 109, 4 N. E. R. 891, 55 Am. R. 189; Wood v. Losey, 50 Mich. 475, 15 N. W. R. 557; Rainwater v. Durham, *supra;* Grace v. Hale, *supra.* But see Mohney v. Evans, 51 Pa. St. 80, *contra.*

[2] Merriam v. Cunningham, 11 Cush. (Mass.) 40.

[3] Randall v. Sweet, 1 Denio (N. Y.), 460; Price v. Sanders, 60 Ind. 310; Darby v. Boucher, 1 Salk. 279; Earle v. Peale, 1 Salk. 386.

It may be recovered in equity. Price v. Sanders, *supra;* Marlow v. Pitfield, 1 P. Wms. 558.

[4] Swift v. Bennett, 10 Cush. (Mass.) 436; Randall v. Sweet, 1 Denio (N. Y.), 460.

[5] Kilgore v. Rich, 83 Me. 305, 22 Atl. R. 176, 23 Am. St. R. 780, 12 L. R. A. 859.

[6] Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746.

[7] Cantine v. Phillips, 5 Harr. (Del.) 428; Chapman v. Hughes, 61 Miss. 339.

[8] Chapple v. Cooper, 13 Mees. & W. 252.

[9] See Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Barker v. Hibbard, 54 N. H. 539, 20 Am. R. 160; Epperson v. Nugent, 57 Miss. 45, 34 Am. R. 434; Englebert v. Troxell, 40 Neb. 195, 26 L. R. A. 177, 42 Am.

held that such fees were not necessaries;[1] but the tendency is to regard them as necessaries in these cases also, if the services were beneficial in recovering or protecting the infant's estate.[2]

b. Of the Incapacity of Married Women.

§ 133. What here considered.— It is not within the province of such a work as this to enter, with any fullness, into a consideration of the legal status of the married woman, for that would require a volume. A brief reference to the chief outlines of the subject is all which space will permit. For fuller discussion recourse must be had to the various treatises which make this question the subject of exhaustive treatment.

§ 134. Common-law disability.— At the common law the unmarried woman, whether maid or widow, was under no contractual disability by reason of her sex; but the married woman, by reason of her coverture, was, in general, under a complete disability to contract, or to acquire, hold or dispose of property in her own right. In contemplation of law, her existence became merged in that of her husband, her bargaining power was lost in his, while her personal property of a tangible nature became his, and her choses in action also, if he reduced them to his possession. She could not, therefore, buy or sell personalty, or enter into binding contracts concerning it.

Exception was made for her benefit in certain cases of purchase. "The first is, when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation or banishment. The disability of the wife in such cases is said to be suspended, for her own benefit, that she may be able to procure a subsistence. She may therefore bind herself as purchaser when her husband, a convict sentenced to transportation, has not yet been sent away, and also when he remains away after his sentence has expired. But

St. R. 665, 58 N. W. R. 852; Askey v. Williams, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. R. 1101.

[1] Phelps v. Worcester, 11 N. H. 51.

[2] Epperson v. Nugent, *supra;* Searcy v. Hunter, 81 Tex. 644, 17 S. W. R. 372, 26 Am. St. R. 837. See also Thrall v. Wright, 38 Vt. 494.

not if he abscond and go abroad in order to avoid a charge of felony."[1]

A second exception was at one time thought to exist where the husband was an alien and resided abroad while she lived in England and purchased there; but this exception has there been discredited.[2]

The third exception was confined to the city of London, where, by custom, a married woman might be a sole trader and bind herself as such.[3]

§ 135. Equitable doctrine concerning separate estate.— In order to relieve these disabilities of the married woman, the court of chancery in England early[4] laid the foundations of a system, since much elaborated, by means of which property could be settled to the separate use of the married woman, with reference to which she could deal to a large extent as though she were unmarried. Under this system she could not only sell[5] or buy,[6] but could also enter into contractual obligations which would bind, not herself personally, but her separate estate.[7] When not restrained by the terms of the settlement, the rule respecting her powers was said in one case[8] to be this: "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obli-

[1] Benjamin on Sale (6th Am. ed.), § 32.

[2] See Benjamin on Sale, §§ 33, 34.

[3] See Benjamin on Sale, § 35.

[4] See Fettiplace v. Gorges (1789), 1 Ves. Jr. 46, 1 Rev. R. 79; Sturgis v. Corp (1806), 13 Ves. 190, 9 Rev. R. 169.

[5] Fettiplace v. Gorges, *supra;* Taylor v. Meads (1865), 4 De Gex, J. & S. 597; Cooper v. Macdonald (1877), 7 Ch. Div. 293.

[6] Duncan v. Cashin (1875), L. R. 10 C. P. 554.

[7] That is, such separate estate as she has at the time of the contract and which remains at the time of the judgment. Pike v. Fitzgibbon (1881), 17 Ch. Div. 454.

[8] Matthewman's Case (1866), L. R. 3 Eq. Cas. 781.

gation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner mentioned must depend upon the facts and circumstances of each particular case."

§ 136. **American statutes removing disabilities.**— The doctrines of the English courts of equity were adopted to some extent in the American states, but, beginning a little prior to 1850, there has been enacted in substantially all of the States a series of remarkable statutes, in some cases supplementing or extending the equitable jurisdiction, but usually establishing a new legal status, by which the rights of the married woman in her separate estate have been confirmed and her power to deal with it as a *feme sole* quite generally established. Space does not permit, nor does the occasion require, any detailed examination of these statutes or the decisions under them. While there is a general similarity, there is yet so much of dissimilarity that the statute of each state must be examined in the light of its own history and judicial interpretation. It must suffice to say that, in most states, the real and personal estate which the married woman possessed at her marriage and that which she has since acquired, remains her separate estate, free from the control of her husband or liability for his debts, and that, in respect of this separate estate, she may contract as though she were unmarried.[1]

§ 137. —— **Capacity limited even under most statutes.**— Her power to make contracts is, usually, not unlimited even under these statutes, but is confined to those which relate to her separate estate. Only to the extent and in the cases that the statute has removed her disability, can she contract; otherwise her common-law incapacity still continues.[2]

[1] These statutes were summarized (in 1886) in Stimson's American Statute Law, art. 645 et seq. They will also be found in the various works on the law of husband and wife, and the rights of married women.

[2] Nash v. Mitchell (1877), 71 N. Y. 199, 27 Am. R. 38; Russell v. Savings Bank (1878), 39 Mich. 671, 33 Am. R. 444; Detroit Chamber of Commerce v. Goodman (1896), 110 Mich. 498, 68 N. W. R. 295.

§ 138. —— **What contracts she may make.**— She may under these statutes generally become a sole trader and buy[1] and sell[2] as such. She may enter into partnership with third persons,[3] and in some States with her husband,[4] and charge her separate estate as such partner. And she may even, though living with her husband, bind her separate estate in purchases which would ordinarily be deemed binding on her husband only, if it appears that the credit was extended to her and not to him.[5]

[1] Nispel v. Laparle (1874), 74 Ill. 306; Krouskop v. Shontz (1881), 51 Wis. 204, 37 Am. R. 817; Brickley v. Walker (1887), 68 Wis. 563; Wallace v. Rowley (1883), 91 Ind. 586; Blumer v. Pollak (1882), 18 Fla. 707 [see also Crawford v. Feder (1894), 34 Fla. 397, 16 S. R. 287]; Sargeant v. French (1882), 54 Vt. 384; Reed v. Newcomb (1891), 64 Vt. 49; Haight v. McVeagh (1873), 69 Ill. 624; Hickey v. Thompson (1889), 52 Ark. 234; Walter v. Jones (1892), 148 Pa. St. 589, 24 Atl. R. 119.

But under the statute a married woman, in Michigan, is not liable upon a note given by herself and husband for the purchase price of property purchased *jointly* with her husband. It is not a contract concerning her separate estate, and she would also become a surety for her husband as to half of the note, which, for the same reason, is beyond her power. Caldwell v. Jones (1897), 115 Mich. 129, 73 N. W. R. 129. See also Speier v. Opfer (1888), 73 Mich. 35, 40 N. W. R. 909, 16 Am. St. R. 556.

[2] Porter v. Gamba (1872), 43 Cal. 105; Trieber v. Stover (1875), 30 Ark. 727; Netterville v. Barber (1876), 52 Miss. 168.

[3] Vail v. Winterstein (1892), 94 Mich. 230, 53 N. W. R. 932, 18 L. R. A. 515. *Contra*, in South Carolina. Vannerson v. Cheatham (1894), 41 S. C. 327, 19 S. E. R. 614.

[4] That she cannot be a partner with her husband, see Artman v. Ferguson (1888), 73 Mich. 146, 16 Am. St. R. 572, 2 L. R. A. 343; Gilkerson-Sloss Com. Co. v. Salinger (1892), 56 Ark. 294, 16 L. R. A. 526, 35 Am. St. R. 105; Seattle Board of Trade v. Hayden (1892), 4 Wash. 263, 16 L. R. A. 530, 31 Am. St. R. 919; Fuller v. McHenry (1892), 83 Wis. 573, 18 L. R. A. 512; Bowker v. Bradford (1885), 140 Mass. 521; Payne v. Thompson (1886), 44 Ohio St. 192; Scarlett v. Snodgrass (1883), 92 Ind. 262; Carey v. Burruss (1882), 20 W. Va. 571, 43 Am. R. 790. That she may be a partner with her husband, see Suau v. Caffe (1890), 122 N. Y. 308, 25 N. E. R. 488, 9 L. R. A. 593; Louisville R. Co. v. Alexander (Ky., 1894), 27 S. W. R. 981; Belser v. Tuscumbia Banking Co. (1895), 105 Ala. 514, 17 S. R. 40; Dressel v. Lonsdale (1892), 46 Ill. App. 454; Lane v. Bishop (1893), 65 Vt. 575, 27 Atl. R. 499. In Tennessee, see Theus v. Dugger (1893), 93 Tenn. 41, 23 S. W. R. 135. In Maine, see Bird Co. v. Hurley (1895), 87 Me. 579, 33 Atl. R. 164.

[5] Thus, a married woman is liable for the price of a suit of clothes purchased by her for her minor son, where the charge was made to her

§ 139. —— Statutory liability for family necessaries.— Formerly in Alabama,[1] and still in Iowa,[2] Illinois,[3] Missouri[4]

by her direction and she agreed to pay it: Hirschfield v. Waldron (1890), 83 Mich. 116, 47 N. W. R. 239; Meads v. Martin (1890), 84 Mich. 306, 47 N. W. R. 583: First Commercial Bank v. Newton (1898), 117 Mich. 433, 75 N. W. R. 934; or for medical services to a minor daughter, under like circumstances: Goodman v. Shipley (1895), 105 Mich. 439, 63 N. W. R. 412; or for wearing apparel for herself: Arnold v. Engleman (1885), 103 Ind. 512; or for board for herself and child: Rushing v. Clancy (1893), 92 Ga. 769, 19 S. E. R. 711.

[1] "For all contracts for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable; to be enforced by action at law, against the husband alone, or against husband and wife jointly." Code, 1876, § 2711. Now repealed.

[2] In Iowa, Code 1897, § 3165, it is provided that "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

"Expenses of the family" are not limited to necessary expenses; it is enough that the expense is incurred on account of the family. Smedley v. Felt, 41 Iowa, 588; Schrader v. Hoover, 80 Iowa, 243. Hence, a piano (Smedley v. Felt, *supra*); an organ (Frost v. Parker, 65 Iowa, 178); a cook stove (Finn v. Rose, 12 Iowa, 565); medical services for the husband or other member of the family (Murdy v. Skyles, 101 Iowa, 549, 70 N. W. R. 714); a watch and other jewelry, even though the watch was presented by the husband to his wife (Marquardt v. Flaughter, 60 Iowa, 148); even a diamond stud worn by the husband (Neasham v. McNair, 103 Iowa, 695, 64 Am. St. R. 202), are all family expenses for which the wife may be held liable under the statute; but a reaping machine (McCormick v. Muth, 49 Iowa, 536), or a plow (Russell v. Long, 52 Iowa, 250), is not such an expense. Many other illustrations are found in the Iowa reports.

[3] In Illinois, the Iowa statute has been adopted verbatim. Starr & Curtis, Ann. Stat. 1896, p. 2133, § 15. In adopting this statute from Iowa, the interpretation put upon it by the Iowa court is adopted also. Myers v. Field, 146 Ill. 50; Glaubensklee v. Low, 29 Ill. App. 408.

Under this interpretation it is not essential that the expenses shall have been "necessary;" the statute applies to family expenses without limitation as to amount, and without regard to the wealth, habits or social position of the parties. Hudson v. King, 23 Ill. App. 118. The wife's consent is not necessary, and the fact that the goods were for the husband's personal use is immaterial. Hudson v. King, *supra*.

[4] In Missouri, Rev. Stats. 1899, § 4340, the real and personal property of the wife which she had at the time of her marriage, or which has come to her since by gift, bequest or inheritance, or by purchase with her separate money, or due as wages

and Oregon,[1] by force of certain unusual and peculiar statutes, her separate estate is made liable for family expenses even though she took no part in contracting them.

c. Of the Capacity of Corporations.

§ 140. In general.— It is, of course, entirely beyond the range of such a work as this to go, with any fullness, into the question of the capacity of corporations to buy and sell. That subject belongs to the special treatises upon the law of corporations. But in attempting to present to the reader's mind a general view of the capacity of parties to enter into the contract of sale, a statement of the most fundamental principles which control the private corporation in this regard seems pertinent. Thus —

§ 141. Corporations as sellers.— Unless restrained by statute or by the inherent nature or purpose of its existence, a private corporation has the same power to dispose of its property by sale that a private individual would have in like circumstances.[2] As is said in one case:[3] "The very idea of private

for her personal service, or by reason of a violation of her personal rights, remains her separate property, and is not in general liable for the debts of the husband, but such personal property "shall be subject to execution . . . for any debt or liability of her husband created for necessaries for the wife or family."

The wife must be a party to the proceeding. Bedsworth v. Bowman, 104 Mo. 44.

[1] In Oregon, Hill's Code, § 2874, it is provided that "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." The cost of a buggy bought by the husband for family use and used by the family is a family expense within the meaning of this statute. Dodd v. St. John (1892), 22 Oreg. 250, 29 Pac. R. 618, 15 L. R. A. 717.

[2] White Water Valley Canal Co. v. Vallette (1858), 21 How. (U. S.) 424; Pierce v. Emery (1856), 32 N. H. 486; Hood v. Railroad Co. (1852), 22 Conn. 1; Richards v. Railroad Co. (1862), 44 N. H. 136; Commonwealth v. Smith (1865), 10 Allen (Mass.), 448; Buffett v. Railroad Co. (1869), 40 N. Y. 176; Reichwald v. Commercial Hotel Co. (1883), 106 Ill. 439; Burton's Appeal (1868), 57 Pa. St. 213.

[3] Miners' Ditch Co. v. Zellerbach (1869), 37 Cal. 543, 99 Am. Dec. 300.

property, in which the public has no rights, involves the idea of a right to sell and convey when the exigencies of the corporation require it." The *jus disponendi*, therefore, necessarily attaches as an incident to the ownership. The general rule with its limitations is well stated by Bigelow, J., as follows: "At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects *quasi*-public, such as railway, canal and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest, to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by *mandamus* or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management."[1]

§ **142. Corporations as purchasers.**— So, also, it is well settled that a private corporation, in the absence of contrary provisions in its charter, has implied power to purchase and hold such property, whether real or personal, as may reasonably be required to enable it to carry on the business and accomplish the purposes for which it was created.[2]

[1] Treadwell v. Salisbury Mfg. Co. (1856), 7 Gray (Mass.), 393, 66 Am. Dec. 490. See also Richards v. Railroad Co. (1862), 44 N. H. 136; Pierce v. Emery (1856), 32 id. 486.

[2] Page v. Heineberg (1868), 40 Vt. 81, 94 Am. Dec. 378; Old Colony R. R. Co. v. Evans (1856), 6 Gray (Mass.). 38, 66 Am. Dec. 394; Spear v. Crawford (1835), 14 Wend. (N. Y.) 23, 28

This power, however, is one which is incidental to its main powers, and the corporation has, therefore, no authority to purchase and hold such property as does not fall within the limits above specified.[1]

A corporation, therefore, organized for the sole purpose of manufacturing cannot, it is held,[2] enforce an executory contract to sell and deliver to it goods which are not to be used in the process of manufacturing, but are to be sold again by the corporation for profit.

The question of the power of a private corporation to buy and hold stock, either its own or that issued by some other corporation, leads so far into questions of general corporation law that it is left for the special treatises upon that subject.[3]

Express limitations may of course be placed, by charter or other fundamental instruments, upon the power of the corporation to acquire and hold property, either real or personal;[4] but the question of the effect of such limitations is also beyond the present purpose and must be left to the special treatises upon corporation law.

d. Of the Capacity of Partnerships.

§ 143. In general.— For reasons similar to those suggested in the preceding subdivision in relation to corporations, a word must be said respecting the power of partnerships to buy and sell.

Partnerships may be organized for any lawful purpose to which the buying and selling of personal property may be more or less germane. In many cases that may be the chief or characteristic purpose of the partnership, distinguishing it

Am. Dec. 513; Moss v. Averell (1853), 10 N. Y. 449; Thompson v. Waters (1872), 25 Mich. 222, 12 Am. R. 243.

[1] Pacific R. R. Co. v. Seely (1870), 45 Mo. 212, 100 Am. Dec. 369; Rensselaer, etc. R. R. Co. v. Davis (1870), 43 N. Y. 137.

[2] Bosshardt & Wilson Co. v. Crescent Oil Co. (1895), 171 Pa. St. 109, 32 Atl. R. 1120.

[3] See, for example, Cook on Corporations, vol. I, §§ 309 et seq.

[4] Compare, for example, Cornell University v. Fiske (1889), 136 U. S. 152, and Farrington v. Putnam (1897), 90 Me. 405, 37 Atl. R. 652, 38 L. R. A. 339.

in many important points from those whose chief purpose is not thus commercial. Thus it is said in a recent case: "The test of the character of the partnership is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation." By this is meant, of course, buying and selling as a business and not as a mere incident to some other business or occupation. The distinction is an important one; for, as can readily be seen and as will be more fully observed hereafter, much greater powers may properly be regarded as incident to a commercial or trading business than to one for the exercise of a profession or occupation merely. Of this distinction and its legal consequences third persons are bound to take notice.[1]

§ 144. The partnership as seller.— The powers of the partnership may be exercised by all of the partners collectively, or by any one partner alone, it being the general rule that each partner is agent for the firm in all matters falling within the scope of the partnership business as it is actually conducted. All of the partners collectively, however, might do acts which a single partner would have no implied power to do, for all might thus extend or exceed the scope of the business, and there would be no one left to complain. But, speaking of the implied power of a partner as falling within the scope of the partnership business, it may be said that each partner has implied authority to sell, assign or dispose of, in the regular course of business, so much of the partnership property as is designed for sale, even though it be the whole property of the firm, and may pass the entire title to it. He may also sell or transfer, in the course of the business, choses in action and other intangible property of the firm, such as its accounts and bills receivable, patent-rights, and the like. And upon the sale he may give such warranties of title or quality, or may make such

[1] See Mechem's Elem. of Partnership, § 162; Lee v. First Nat. Bank (1890), 45 Kan. 8, 25 Pac. R. 196, 11 L. R. A. 238; Winship v. Bank of United States (1831), 5 Peters (U. S.), 529; Pease v. Cole (1885), 53 Conn. 53, 55 Am. R. 53; Smith v. Sloan (1875), 37 Wis. 285, 19 Am. R. 757; Woodruff v. Scaife (1887), 83 Ala. 152.

incidental contracts in relation thereto, as are usually made in like cases.[1]

The implied power of one partner to sell the entire property of the firm is, by the weight of authority, limited to that kept for sale and does not include the power to sell that kept for the purposes of carrying on the business.[2]

§ 145. The partnership as buyer.— The same general principles apply where the partnership is buying. All of the partners might so act as to foreclose themselves from asserting that the purchase was not within the scope of the partnership business; but the power of one partner, ordinarily, must be measured by that scope.

The distinction between trading and non-trading firms is here material, but not conclusive as to the implied power to buy. In the case of the trading firm, whose business it is, in whole or in part, to buy goods for use or sale, the power of each partner to buy such goods must clearly be implied. It must also be implied in the case of a non-trading firm if the purchase is within the scope of the business as actually conducted.[3]

The purchase may be on credit, and may be of either real or personal property within the limits stated.

If the power exists, the firm is none the less bound because the partner buying subsequently misapplies the goods.

II.

Of Sales by Persons Having Only a Defeasible Title.

§ 146. Person in possession under a defeasible title may transfer good title to bona fide purchaser.— It frequently happens that a person may be in possession of goods, as owner,

[1] See Mechem's Elem. of Partnership, § 186; Ellis v. Allen (1886), 80 Ala. 515, 2 S. R. 676; Crites v. Wilkinson (1884), 65 Cal. 559, 4 Pac. R. 567; First Nat. Bank v. Freeman (1882), 47 Mich. 408; Schneider v. Sansom (1884), 62 Tex. 201.

[2] See Lowman v. Sheets (1890), 124 Ind. 417, 24 N. E. R. 351, 7 L. R. A. 784; Wilcox v. Jackson (1884), 7 Colo. 521, 4 Pac. R. 966; Cayton v. Hardy (1858), 27 Mo. 536.

[3] See Mechem's Elem. of Partnership, § 176; Bond v. Gibson (1808), 1 Camp. 185, Ames' Cas. on Partn. 537, and note; Lynch v. Thompson (1883),

having a title thereto not absolute but subject to defeasance upon the happening of some condition subsequent, or upon the act of some other person having a paramount right. The person so situated has a title to the goods, which may be defeated or not, but which until it is defeated confers upon him many of the rights of an owner. Among these rights is that of transferring at least such interest as he has, and, in many cases, where his vendee has acted in good faith, and paid value for the goods in ignorance of the defeasible character of the title, such vendee will acquire the title freed from its defeasible nature. The more important of these cases will be here considered.

§ 147. —— One holding subject to a secret lien.— A familiar illustration of this rule is found in the case of one who has a title to goods subject to some secret lien, which while good between the parties cannot prevail against a purchaser who buys the goods in good faith without notice of the lien. The common instance of the chattel mortgage not filed or recorded as the law directs and not otherwise brought to the notice of the purchaser affords a typical illustration. As said in such a case:[1] "It is too well settled to admit of argument or doubt, that if the general owner of personal property, having possession thereof, sell and deliver it to a person who has no notice, actual or constructive, that the property is incumbered, but who purchases it in good faith for value, such purchaser will hold the property discharged of any prior incumbrance."

§ 148. —— Fraudulent vendee.— Another, and one of the most common illustrations of this rule, is that of the vendee who has purchased goods by means of such fraudulent practices that his vendor may rescind the sale. What these cases are is more fully considered in later sections,[2] but, as will there

61 Miss. 354; Stillman v. Harvey (1879), 47 Conn. 27; Johnston v. Trask (1889), 116 N. Y. 136, 22 N. E. R. 377, 15 Am. St. R. 394, 5 L. R. A. 630; Porter v. Curry (1869), 50 Ill. 319, 99 Am. Dec. 520; Davis v. Cook (1879), 14 Nev. 265; Kenney v. Altvater (1874), 77 Pa. St. 34.

[1] Andrews v. Jenkins (1876), 39 Wis. 476.

[2] See *post*, § 886 et seq.

be seen, it is settled that the sale is not void but merely voidable. The defrauded vendor may disaffirm the sale, or he may ratify and confirm it; but, until he has disaffirmed it, his vendee has such a title that he may transfer a complete and indefeasible title to one who purchases the goods from him for value in good faith and without notice of the fraud.[1]

This rule and the reasons for it were well stated by Chief Justice Shaw, as follows: "It is a well-established rule that goods obtained by fraud in the sale, as by false representations, may be reclaimed by the vendor. This does not proceed on the ground that the property in the goods does not pass by the sale, but that the dishonest purchaser shall not hold it against the deceived vendor. But it is at the option of the vendor to rescind the contract and reclaim the goods or not. If he elects to rescind and avoid the sale, he must do it within a reasonable time after coming to the knowledge of the fraud. If he does anything to affirm the sale, after a full knowledge of the facts — especially if he suffer a considerable time to elapse, or if others are induced by his affirmance to act,— he will not be entitled to disaffirm the sale and reclaim the goods. By the contract, the vendee takes the property in the goods; but he takes by title defeasible, because, as against the vendor, he cannot honestly, and of course not legally, hold them. But this right of reclaiming can be enforced only whilst the goods are in the hands, *first*, of the fraudulent purchaser; or *secondly*, of some agent, trustee or other person holding for the use and benefit of the purchaser; or *thirdly*, of some one who has taken them of the purchaser with knowledge of the fraud by which they they were obtained, or with notice sufficient to put him on rea-

[1] Hoffman v. Noble (1843), 6 Metc. (Mass.) 68; Kingsbury v. Smith (1842), 13 N. H. 109; White v. Garden (1851), 10 C. B. 919, 20 L. J. C. P. 166, 70 Eng. Com. L. 918; Kingsford v. Merry, 25 L. J. Ex. 166; Pease v. Gloahec, L. R. 1 Pr. Coun. 219; Porell v. Cavanaugh (1898), 69 N. H. 364, 41 Atl. R. 860 [citing Bradley v. Obear, 10 N. H. 477; Farley v. Lincoln, 51 N. H. 577; Sleeper v. Davis, 64 N. H. 59, 6 Atl. R. 201; Rowley v. Bigelow, 12 Pick. (Mass.) 307]; Holland v. Swain (1879), 94 Ill. 154; Doane v. Lockwood (1886), 115 Ill. 490; Curme v. Rauh (1884), 100 Ind. 247; Robinson v. Levi (1886), 81 Ala. 134.

sonable inquiry, including under this head a mere volunteer who has obtained the goods without paying any valuable consideration. It follows that a purchaser for a valuable consideration without notice takes a title from the vendee which is not defeasible, and will therefore hold the goods."[1]

Who may be deemed to be such a *bona fide* purchaser and what considerations will be deemed sufficient are more fully considered in the later sections already referred to.[2]

§ 149. —— Person who obtained goods by trick without a sale.— But this rule, protecting the *bona fide* purchaser, does not apply where the person from whom he bought had himself obtained the goods by means of some trick or device and not through the form of a sale to him. Thus where A falsely represents himself to be B,[3] or the agent[4] or partner[5] of B, or even the agent of a person not named but represented to be in

[1] In Hoffman v. Noble(1843), 6 Metc. (Mass.) 68.

[3] Thus where one A. Blenkarn by means of various devices caused himself to appear to be W. Blenkiron & Co., and thereby obtained goods which the owners supposed they were selling to the latter firm, it was held that Blenkarn obtained no title whatever, as there was never any contract with him, and even his *bona fide* vendee could obtain none. Cundy v. Lindsay (1878), 3 App. Cas. 459. To like effect: Higgons v. Burton (1857), 26 L. J. Exch. 342.

[4] Thus where S. an impostor, went to D., and, claiming to be the agent of B., contracted with D. for the sale of goods to B., and then went to B., and, claiming to be the agent of D., contracted to sell the same goods to B.; and, having obtained possession of the goods, delivered them to B. and received the price. it was held that D.'s title was not divested, and that B. was liable to D. Barker v. Dinsmore (1872), 72 Pa. St. 427, 13 Am. R. 697. Compare with McGoldrick v. Willits (1873), 52 N. Y. 612, the facts of which are stated in note to § 165, *post.* To same effect: Edmunds v. Merchants' Transp. Co. (1883), 135 Mass. 283; Dean v. Yates (1872), 22 Ohio St. 388; Hamet v. Letcher (1881), 37 Ohio St. 356, 41 Am. R. 519; Alexander v. Swackhamer (1885), 105 Ind. 81, 55 Am. R. 180; Hentz v. Miller (1883), 94 N. Y. 64; Peters Box Co. v. Lesh (1888), 119 Ind. 98. See also Decan v. Shipper (1860), 35 Pa. St. 239, 78 Am. Dec. 334; Soltau v. Gerdau (1890), 119 N. Y. 380, 16 Am. St. R. 843, 23 N. E. R. 864. So also, where one represented to be the agent of a corporation which, in fact, did not exist. Wyckoff v. Vicary (1894), 75 Hun (N. Y.), 409.

[5] Such was the case in Hardman v. Booth (1863), 32 L. J. Exch. 105, and Moody v. Blake (1874), 117 Mass. 23, 19 Am. R. 394.

good credit,[1] and by means thereof obtains goods which the owner did not intend to sell to A but to B, or the other alleged principal of A, A obtains no title at all, and a *bona fide* purchaser from A can acquire none.

§ 150. —— **Fraudulent grantee of debtor.**— Another case falling within the same general principle is that of the *bona fide* purchaser from the fraudulent grantee of a debtor. It is, indeed, true, as will be seen hereafter,[2] that if a debtor sells, assigns or otherwise disposes of his goods for the purpose of defrauding his creditors, his assignee, who is a party to the fraud, obtains only a defeasible title, which may be impeached by the debtor's creditors; but if before the creditors have acted the debtor's grantee again sells the goods to one who is ignorant of the fraud, and in good faith pays value for them, the latter will obtain a title which cannot be assailed by the creditors of the debtor.[3]

§ 151. —— **Fraudulent debtor.**— And again, allied to the last case, it will be seen hereafter,[4] that though sales made by a debtor, for the purpose of defrauding his creditors, may in general be set aside, this is not true where his vendee was ignorant of his fraudulent intent and bought the goods in good faith and for value.[5]

§ 152. —— **Conditional vendee.**— Unlike the cases here being considered, and to be distinguished from them, is the case of the purchaser who has contracted upon the condition that, though the possession may be delivered to him, no title shall

[1] Such was the case in Rodliff v. Dallinger (1886), 141 Mass. 1, 4 N. E. R. 805, 55 Am. R. 439.

[2] See *post*, §§ 946 *et seq.*

[3] Anderson v. Roberts (1820), 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; Neal v. Williams (1841), 18 Me. 391; Green v. Tanner (1844), 8 Metc. (Mass.) 411; Sleeper v. Chapman (1876), 121 Mass. 404; Gordon v. Ritenour (1885), 87 Mo. 54; Comey v. Pickering (1884), 63 N. H. 126; Stokes v. Jones (1851), 18 Ala. 734; Waters v. Riggin (1862), 19 Md. 536; Barnes v. Hardeman (1855), 15 Tex. 366.

[4] See *post*, § 946.

[5] See *post*, § 952; Zoeller v. Riley (1885), 100 N. Y. 103, 2 N. E. R. 388; Neal v. Williams (1841), 18 Me. 391; Sleeper v. Chapman (1876), 121 Mass. 404; Comey v. Pickering (1884), 63 N. H. 126.

pass to him until the price is paid. Here, until the payment of the price, the vendee has by the express terms of the agreement no present title at all, not even a defeasible one; and, as will be seen, it is settled, by the great weight of authority, that until he acquires title by payment he can transfer none even to a *bona fide* purchaser for value.[1]

§ 153. —— Purchaser for cash who has obtained the goods without paying the price.— In like situation is the purchaser for cash who has obtained possession of the goods without paying the price. As will be seen hereafter,[2] payment and transfer are, in such cases, designed to be concurrent acts; and if the vendee, by trick or otherwise, without paying gets possession of the goods, the seller, who has done nothing to waive his right, may recover them from the vendee. While the vendee is so holding them his interest is only a conditional one, and he can convey no greater, even to a *bona fide* purchaser.[3]

The same rule applies also where, instead of payment in cash, a note or other security for the price is to be given. If the giving of the note or other security be not waived, but the vendee obtains possession of the goods, he acquires no present title and can convey none, even to a *bona fide* purchaser.[4]

III.

Of Sales by Persons Having Only an Ostensible Title.

§ 154. In general, one can convey no better title to a chattel than he has.— It is a fundamental doctrine of the common law, from which all discussion of the question must proceed, that, in general, no one can transfer a better title to a chattel

[1] See *post*, § 599.

[2] See *post*, § 542.

[3] National Bank of Commerce v. C., B. & Q. R. Co. (1890), 44 Minn. 224, 46 N. W. R. 342, 560; Freeman v. Kraemer (1895), 63 Minn. 242, 65 N. W. R. 455; Globe Milling Co. v. Minneapolis Elevator Co. (1890), 44 Minn. 153, 46 N. W. R. 306; Owen v. Long (1897), 97 Wis. 78, 72 N. W. R. 364.

[4] Wheeler & Wilson Co. v. Irish-American Bank (1898), 105 Ga. 57, 31 S. E. R. 48.

than he himself possesses. *Nemo dat quod non habet* is usually the inflexible maxim. That some or all of the parties acted in good faith or parted with value is usually entirely immaterial; however innocent the motives or however valuable the consideration, if the party who assumed to convey had no right or title to transfer, no title can pass to the other.[1]

In the case of negotiable instruments, for obvious reasons, different principles apply, and it is possible in many cases for one to invest his transferee with a better title than he himself possessed; but these principles have no application to the transfer of the ordinary chattel. In the latter case the strict rules of the common law have, in general, unabated sway.

§ 155. —— True owner not to be divested without his consent.— This general principle of the common law has nowhere been better stated than by Senator Verplanck in the leading case of *Saltus v. Everett:*[2] "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That 'no one can transfer to another a better title than he himself has' is a maxim, says Chancellor Kent, 'alike of the common and the civil law, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeed to the rights of the vendor.' The only exception to this rule in the ancient English jurisprudence was that of sales in markets overt, a custom

[1] Saltus v. Everett (1838), 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Levi v. Booth (1882), 58 Md. 305, 42 Am. R. 332; Barnard v. Campbell (1874), 55 N. Y. 456, 14 Am. R. 289; McNeil v. Tenth Nat. Bank (1871), 46 N. Y. 325, 7 Am. R. 341; Covill v. Hill (1847), 4 Denio (N. Y.), 323; Cundy v. Lindsay (1878), 3 App. Cas. 459; Jetton v. Tobey (1896), 62 Ark. 84, 34 S. W. R. 531; Soltau v. Gerdau (1890), 119 N. Y. 380, 23 N. E. R. 864, 16 Am. St. R. 843; Moody v. Blake (1874), 117 Mass. 23, 19 Am. R. 394; Smith v. Clews (1889), 114 N. Y. 190, 21 N. E. R. 160, 11 Am. St. R. 627, 4 L. R. A. 392; Klein v. Seibold (1878), 89 Ill. 540; McMahon v. Sloan (1849), 12 Pa. St. 229, 51 Am. Dec. 601; Quinn v. Davis (1875), 78 Pa. St. 15; Wilson v. Crocket (1869), 43 Mo. 216, 97 Am. Dec. 389; Stanley v. Gaylord (1848), 1 Cush. (Mass.) 536, 48 Am. Dec. 643.

[2] Saltus v. Everett, *supra.*

which has not been introduced among us. 'It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently, as a general rule, the title of the true owner cannot be lost without his consent.'"

§ 156. Possession alone insufficient evidence of title.—It is a popular impression which has barely enough apparent foundation to make it specious, that possession is sufficient evidence of ownership. A moment's consideration, however, will show the fallacy. It is true that ownership ordinarily carries with it the right of possession; but the reverse of this idea by no means follows, for possession is very far from carrying with it the right of ownership. Whether the possessor is the true owner, or a bailee, or the finder, or a thief, the evidence of possession may be precisely the same, and to make possession the test of ownership is obviously impossible. It may be *prima facie* evidence, but it is nothing more.

Whoever, therefore, buys from one in possession must see to it, at his peril, that the seller has some other title than that which possession alone confers upon him. For if the seller were but a bailee for the true owner, his servant or lessee, or if the seller were a mere finder, or a thief, the purchaser, however innocent he may have been, or however much he may have paid for the property, can acquire no claim as against the true owner of the goods.[1]

"Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to pre-

[1] Cundy v. Lindsay (1878), 3 App. Cas. 459; McNeil v. Tenth National Bank (1871), 46 N. Y. 325, 7 Am. R. 341; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Barnard v. Campbell (1874), 55 N. Y. 456, 14 Am. R. 289, 58 N. Y. 73, 17 Am. R. 208; Leigh v. Mobile & Ohio R. Co., 58 Ala. 178; Jetton v. Tobey (1896), 62 Ark. 84, 34 S. W. R. 531; London Joint Stock Bank v. Simmons, [1892] App. Cas. 201; Woods v. Nichols (1900), 21 R. I. 537, 45 Atl. R. 548; Goodell v. Fairbrother (1878), 12 R. I. 233; Warder v. Rublee, 42 Minn. 23, 43 N. W. R. 569; Baker v. Taylor, 54 Minn. 71, 55 N. W. R. 823; Velsian v. Lewis, 15 Oreg. 549, 16 Pac. R. 631, 3 Am. St. R. 184.

clude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.'"[1]

§ 157. **Possession coupled with indicia of ownership.**—But while possession alone is thus not sufficient evidence of ownership, it is possible that the true owner may have clothed the possessor with such additional evidence of title as to cause the possessor to appear to be the owner. "It must be conceded," it is said in a leading case,[2] "that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

§ 158. —— **What requisite.**—In order, however, that this rule shall operate, it is essential that the acts relied upon as indicating ownership by the possessor shall be acts for which the true owner is responsible; for it is clear that no acts of the possessor alone can suffice to cut off the rights of the true owner.

[1] Rapallo, J., in McNeil v. Tenth National Bank, *supra*, quoting Denio, J., in Covill v. Hill, 4 Denio (N. Y.), 323.

[2] McNeil v. Tenth National Bank (1871), 46 N. Y. 325, 7 Am. R. 341.

The acts relied upon must, moreover, be such as to reasonably warrant the conclusion that the possessor was authorized to sell. Thus, for example, while it may be true that sending goods to an auction room, or to any other place to which goods are sent only to be sold, sufficiently indicates that the owner desires them sold,[1] still the mere fact that one puts his goods, for some other purpose than sale, into the possession of one who may happen to be a dealer in similar goods, does not of itself justify the conclusion that the dealer is to sell these goods. "Independently of the provisions of the statute in regard to the dealings with agents and factors, it is very clear," it is said,[2] "that the *bare possession* of goods by one, though he may happen to be *a dealer* in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods to the preclusion of the right of the real owner. If he sells *as owner* there must be some other *indicia* of property than mere possession. There must be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments." "It is not every parting with the possession of chattels or the documentary evi-

[1] Thus in Pickering v. Busk (1812), 15 East, 38, Lord Ellenborough said: "If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."

[2] Levi v. Booth (1882), 58 Md. 305, 42 Am. R. 332.

dence of title," it is said in another case,[1] "that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title."

§ **159.** ——. Again, the purchaser must actually have parted with value in reasonable reliance upon the apparent authority so that he will be prejudiced if the transaction is not upheld. "Two things must concur," it is said,[2] "to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to or authority to dispose of it; and 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*."

And lastly, the purchaser must have acted in ignorance of the rights of the true owner, for if he has notice of the latter's interests, or, what is the same thing, knowledge of facts sufficient to put him upon inquiry, he can acquire no greater title than the apparent owner can rightfully convey.[3]

§ **160.** —— **Illustrations.**— Many illustrations of these principles are to be found in the books. In a case often cited[4] it appeared that one Miers was, in a small way, a dealer in diamonds in New York. His business was to procure diamonds from the larger dealers and sell them to his customers. On one

[1] Barnard v. Campbell (1874), 55 N. Y. 456, 14 Am. R. 289.

[2] Barnard v. Campbell, *supra*.

[3] Porter v. Parks (1872), 49 N. Y. 564; Perkins v. McCullough (1897), 31 Oreg. 69, 49 Pac. R. 861; Sloan v. Hudson (1898), 119 Ala. 27, 24 S. R. 458.

[4] Smith v. Clews (1887), 105 N. Y. 283, 59 Am. R. 502.

occasion he obtained from the plaintiffs a pair of diamonds for which he gave them a receipt stating that they were received by him "on approval to show to my customers, said knobs to be returned to said A. H. Smith & Co. on demand." Miers sold these diamonds to the defendant, who bought them in good faith, supposing Miers to be the owner, and paid him the price. Miers did not pay the plaintiffs, and they sought to recover the diamonds from the defendant; but the court held that the plaintiffs, by intrusting them to Miers, a known dealer in such articles, to be shown to a prospective purchaser, had clothed him with apparent authority to sell, and therefore that the purchaser obtained a good title. The provision that the diamonds were to be returned upon demand was held by the court to mean that they were to be returned if the purchaser in view did not buy them.

On the other hand, where the owner of a diamond ring put it into the hands of a traveling trader in jewelry to obtain a match for it, or, failing in that, to get an offer for it, and the jeweler sold it to one who bought in good faith, it was held that the purchaser acquired no title as against the owner.[1] Authority to find a match for it, or even to get an offer for it, conferred no apparent authority to sell, for the owner thereby reserved to himself the right to accept or reject the offer if one were made.

§ 161. ——. In a leading English case[2] it appeared that a broker named Swallow had purchased for the plaintiff, Pickering, a quantity of hemp, which at the plaintiff's request was transferred upon the books of the wharfinger to the name of Swallow. Another lot subsequently purchased was transferred to the names of "Pickering *or* Swallow," which the court held to be the same, so far as the question then involved was concerned, as though it stood in Swallow's name alone. The plaint-

[1] Levi v. Booth (1882), 58 Md. 305, 42 Am. R. 332. Compare Rumpf v. Barto (1894), 10 Wash. 382, 38 Pac. R. 1129.

[2] Pickering v. Busk (1812), 15 East, 38.

iff paid for the hemp. Swallow afterwards sold it to a third person, who relied upon the entry in the wharfinger's books and paid Swallow for it; and Pickering sued the purchaser in trover for the value. The court, however, held that by permitting the hemp to appear upon the books of the wharfinger as the property of Swallow, the plaintiff had authorized third persons, who relied upon Swallow's apparent ownership, to believe that he had authority to sell the hemp, and that Pickering therefore could not recover.

§ **162.** ——. In a New York case,[1] often relied upon, it appeared that the plaintiff, who was the owner of certain bank shares, had delivered to his brokers, to secure a balance of account, the certificate of the shares, indorsed with an assignment in blank and an irrevocable power of transfer, signed and sealed by himself. The brokers, without his knowledge or consent, pledged the shares to the defendant to secure advances made to them, the defendant having no notice of the plaintiff's interest. The plaintiff brought action against the defendant to compel a restoration of the shares, but it was held that the defendant was entitled to hold the stock as against the plaintiff for the full amount of the advances remaining unpaid. "The

[1] McNeil v. Tenth National Bank (1871), 46 N. Y. 325, 7 Am. R. 341.

For similar or analogous cases, see Commercial Bank v. Kortright (1839), 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Holbrook v. Zinc Co. (1874), 57 N. Y. 616, 623; Bartlett v. Board of Education (1871), 59 Ill. 364, 371; Wood's Appeal (1880), 92 Pa. St. 379; Cowdrey v. Vandenburgh (1879), 101 U. S. 572; London Joint Stock Bank v. Simmons, [1892] App. Cas. 201.

But in order that the rule of this case should apply, it is necessary that there be something more than the mere intrusting to a servant of a chattel and the consequent opportunity for theft. Hence where a previously trustworthy agent of a corporation fraudulently abstracted from the company's safe uncanceled certificates of stock, indorsed in blank, and negotiated them, it was held that no title passed. Knox v. Eden Musee Co. (1896), 148 N. Y. 441, 42 N. E. R. 988.

So where A. and B. had a safety deposit box in common, and A. left in the box some certificates of stock indorsed in blank, which B. abstracted and sold to a *bona fide* purchaser, it was held that the latter acquired no title against A. Bangor Electric Co. v. Robinson (1892), 52 Fed. R. 520.

holder of such a certificate and power," said the court, "possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but apparently the legal title and the means of transferring such title in the most effectual manner."

§ **163.** ——. In a case before the supreme court of the United States,[1] it appeared that the plaintiff, who resided in California, instructed his agent in New York to cause a steamboat to be built, giving the agent express directions to hold himself, the agent, out as owner, and to cause the vessel to be enrolled in his, the agent's, own name, as the principal did not wish to appear, or be known, as the owner. The agent followed these instructions, but, upon the completion of the vessel, sold her to the defendant, who purchased in good faith, relying upon the agent's apparent ownership, and paid the agent her full value. The agent converted the proceeds to his own use, and the plaintiff brought the action to establish his title as against the purchaser. But it was held here also that, having held the agent out to the world as owner, and having intentionally clothed him with the documentary evidence of ownership, the plaintiff could not recover from one who, in good faith, has purchased the property in reliance upon such apparent ownership.

§ **164.** ——. In another case[2] the plaintiff had employed an agent to purchase a horse. The agent made the purchase, but

[1] Calais Steamboat Co. v. Van Pelt (1862), 2 Black (67 U. S.), 372.

Where the owner of a wagon, for his own gain, allowed the name and occupation of another person to be painted on it, and permitted it to remain in the possession of that person, he so clothes the latter with the *indicia* of ownership that a sale by him to a *bona fide* purchaser will transfer a good title. O'Connor v. Clark (1895), 170 Pa. St. 318, 32 Atl. R. 1029.

[2] Nixon v. Brown (1876), 57 N. H. 34. See also Goldstone v. Merchants' Ice & Cold Storage Co. (1899), 123 Cal. 625, 56 Pac. R. 776.

took the bill of sale in his own name. He informed his principal of the purchase, showed him the bill of sale, and promised to execute a similar one to the principal, but did not do so. It was then agreed that the agent should keep the horse in his own possession for the purpose of training him, and the agent went away taking with him the horse and the bill of sale. Afterwards the agent sold the horse to the defendant, who bought it in good faith, in reliance upon the bill of sale, and paid the agent the money, with which the latter decamped. The plaintiff sued this purchaser in trover, but was not permitted to recover, because he had allowed his agent to appear to be the owner, and had clothed him with the *indicia* of title.

§ 165. —— **Limitations.**— But in order to estop the true owner it is, as has been seen, indispensable not only that he has clothed the person assuming to dispose of the property with the apparent title to it, or with apparent authority to dispose of it, but also that the person asserting the estoppel must have acted, and parted with value, upon the faith of such apparent ownership or authority, so that he will be prejudiced if the appearances to which he trusted are not real. This principle is well illustrated by a case which received elaborate consideration in the court of appeals of New York.[1] It there

[1] Barnard v. Campbell (1874), 55 N. Y. 456, 14 Am. R. 289, 58 N. Y. 73, 17 Am. R. 208.

In McGoldrick v. Willits (1873), 52 N. Y. 612, one Roberts, who was a retail liquor dealer on Long Island, went to Willits, who was also a retail liquor dealer in the same vicinity, and, saying to Willits that he was carrying on a distillery, in the name of another, at Brooklyn, offered to sell Willits five barrels of whisky, like a sample which he then produced. Willits ordered of Roberts the whisky. Roberts then went to N. P. McGoldrick, who kept a wholesale liquor store in Brooklyn, said that he was agent for Willits, and ordered five barrels of whisky sent to the latter. The McGoldricks shipped the whisky by rail addressed to Willits at his place of business. After the whisky reached the depot, Roberts went to Willits, showed him an invoice of five barrels of whisky purporting to come from "Lewis & Co.," told him the whisky was at the station, and they both went to the station, where they found the whisky shipped by McGoldrick. Willits paid the freight, obtained the whisky, and paid Roberts for it. When McGoldrick demanded payment, Willits refused on the ground that he bought the

appeared that the defendants, after some negotiations, had purchased of one Jeffries, on the 21st of August, a quantity of linseed, and, at his request, had given him their notes in payment. These notes Jeffries at once pledged to third persons as collateral to a loan to himself. Jeffries did not have the linseed at the time, though he had been negotiating with the plaintiffs for it, and on the 21st of August had made a contract with them for its purchase. On the 24th of August, by false and fraudulent representations, he induced them to deliver it to him without payment. He sent the linseed to the defendants on the 24th of August, and on the next day mailed them the bill of lading. On August 27th Jeffries failed, not having paid for the linseed, and the plaintiffs, on account of the fraudulent representations, rescinded the sale to Jeffries and demanded the linseed of the defendants. Upon their refusal to surrender

whisky of Roberts and had paid him for it. McGoldrick sued Willits and was allowed to recover, the court holding that McGoldrick had done nothing to clothe Roberts with any apparent title to or authority over the goods. See also other cases cited in notes to § 149, *ante*.

In Armstrong v. Freimuth (1899), 78 Minn. 94, 80 N. W. R. 862, it appeared that one Van Baalen executed a bill of sale of a piano which he owned to W., but it was in fact a mortgage to secure a usurious loan. It was recorded. W. then executed a bill of sale of the piano to the plaintiff. Van Baalen at all times held possession of the piano. Plaintiff contended that Van Baalen was estopped to show that the bill of sale was a chattel mortgage to secure a usurious loan. *Held*, that the owner is estopped from asserting his claim as against a purchaser only when he invests another with the *indicia* of an absolute title thereto, and such person while actually in possession sells to a *bona fide* purchaser without notice and for value. But here the plaintiff's vendor never had possession.

One who deposits wheat for storage, knowing that it is to be commingled with wheat owned by the warehouseman, and that the latter is selling and publicly shipping from the common mass, is estopped to assert title as against an innocent purchaser from the warehouseman in the usual course of business. Preston v. Witherspoon (1886), 109 Ind. 457, 58 Am. R. 417.

The plaintiff consigned a piano to the firm of B. & E., to be sold for cash. With the assent of E., B. took the piano to his own house, where he used it for nine or ten months, when he sold it, as belonging to himself or wife, to the defendant, who paid a fair price and bought in good faith. *Held*, that the plaintiff could not recover the piano from such purchaser. Dias v. Chickering (1885), 64 Md. 348, 54 Am. R. 770.

it, plaintiffs brought replevin. The defendants assumed the position of *bona fide* purchasers for value, and, claiming that they had purchased upon the faith of the possession conferred by the plaintiffs upon Jeffries, invoked the principle of estoppel for their protection. But the court held that every element of estoppel was wanting. At the time defendants purchased the linseed and parted with their notes, Jeffries had neither the possession nor the right of possession of the linseed; nor had he any documentary evidence of title, or any *indicia* of ownership or of dominion over the property of any kind. The plaintiff had then done nothing to induce the defendants to put their faith in, or give credit to, the claim of Jeffries of a right to sell the property. The defendants parted with their notes, not upon the apparent ownership of Jeffries, but upon his assertion of a right of which the plaintiffs had no knowledge, and for which they were in no way responsible.

§ 166. Appearance of title from possession of bill of lading or warehouse receipt.— An appearance of title may very effectually be created, though no title may in fact exist, by the possession of a bill of lading of the goods. While not strictly negotiable, in the absence of a statute declaring them so,[1] bills of lading are regarded, in commercial transactions, as being, in a very complete sense, the representatives of the goods themselves;[2] warehouse receipts also, in many States, by statute or usage, stand upon the same footing;[3] and if the true owner of the goods permits another to appear to be the legal holder of a bill of lading or warehouse receipt for them, he will so far clothe him with an ostensible title that a *bona fide* purchaser, upon the indorsement and delivery to him of the bill of lad-

[1] See, for example, Shaw v. Railroad Co. (1879), 101 U. S. 557.

[2] See Friedlander v. Railway Co. (1888), 130 U. S. 416.

[3] See Gibson v. Stevens (1850), 49 U. S. (8 How.) 384; Adams v. Foley (1856), 4 Iowa, 44; Davis v. Russell (1878), 52 Cal. 611, 28 Am. R. 647; Broadwell v. Howard (1875), 77 Ill. 305; Merchants' Bank v. Hibbard (1882), 48 Mich. 118, 42 Am. R. 465; Allen v. Maury (1880), 66 Ala. 10; Bank of Newport v. Hirsch (1894), 59 Ark. 225, 27 S. W. R. 74.

ing or warehouse receipt, will obtain an indefeasible title to the goods.[1]

This will be true, as in the case of a sale of the goods themselves, if the true owner voluntarily permitted the bill of lading or receipt to be so possessed, even though his consent was induced by fraud or mistake;[2] but it will not be true where the true owner had not consented, but the bill of lading or receipt was obtained against his will, as by finding, theft, or similar act.[3]

§ 167. Ostensible title of vendor permitted to retain possession.— Somewhat akin to the questions here being considered is that of the effect of leaving the seller in possession after a sale of the goods. It is, in general, true, as will be seen, that delivery of possession is not essential to the transfer of the title, at least as between the parties; but where one purchaser of the goods voluntarily leaves them in the possession of the seller, and the latter then sells them again to another who buys in good faith, paying value in ignorance of the rights of the first purchaser, and obtains possession of the goods, the question of the respective rights of the two purchasers presents obvious difficulties. The rule is often declared to be, as will be seen hereafter, that, of two equally innocent purchasers from the same vendor, he who first obtains possession of the goods shall hold them; though it must be conceded that the condition of the law upon this question is far from satisfactory. The matter is usually dealt with under the head of fraud, and it is so discussed in this book in later sections;[4] but the suggestion has sometimes been made that, by leaving the vendor in possession, the first vendee so clothes the vendor with the ostensible title that he should not be permitted to recover as

[1] Conard v. Atlantic Ins. Co. (1828), 1 Pet. (U. S.) 386; Winslow v. Norton (1849), 29 Me. 419; Newhall v. Central Pac. R. Co. (1876), 51 Cal. 345, 21 Am. R. 713; Barber v. Meyerstein (1870), L. R. 4 H. L. 317; Cahn v. Packet Co., [1899] 1 Q. B. 643.

[2] Dows v. Greene (1862), 24 N. Y. 638.

[3] See, per Lord Campbell, in Gurney v. Behrend (1854), 3 El. & Bl. 633, 77 Eng. Com. L. 622; Brower v. Peabody (1855), 13 N. Y. 121; Shaw v. Railroad Co. (1879), 101 U. S. 557.

[4] See *post*, §§ 979–992.

against a later *bona fide* purchaser who obtains possession. "Under such appearances of ownership," it is said, "every man is justified in regarding him as being still the owner."[1]

As has been stated, however, leaving the vendor in possession has usually been deemed evidence, more or less conclusive in various jurisdictions, of either actual or constructive fraud; and however plausible may be the suggestion which makes its notice in this place permissible, it is deemed wiser to defer its fuller treatment until the subject of fraud upon creditors and subsequent purchasers is reached.[2]

§ 168. Ostensible title under Factors Acts.— An ostensible title may also be acquired under the operation of the statutes generally known as Factors Acts. By the ordinary rules of the common law, a factor or other agent, having the goods of his principal in his possession, could convey no title, even to a *bona fide* holder, by any transfer or pledge of his principal's goods in payment or security for his own debts.[3] But inasmuch as the factor often deals in his own goods as well, and it is impracticable, if not impossible, in many cases for third persons dealing with him to know whether the goods are his own, or whether he has authority to pledge them, statutes have been passed in England and in several of the States[4] designed to protect those who have dealt with the factor in good faith in reliance upon his apparent title.

Thus, for example, the statute in New York provides that "every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be

[1] Streeper v. Eckart (1837), 2 Whart. (Pa.) 302; Daniels v. Nelson (1868), 41 Vt. 161.

[2] *Post.* §§ 930, 979.

[3] See Mechem on Agency, § 994.

[4] Such statutes exist in New York, Maine, Massachusetts, Maryland, Ohio, Kentucky, Pennsylvania, Wisconsin, and Rhode Island.

the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."[1]

§ 169. —— How such statutes construed.— Statutes of this sort, being in contravention of the common law, are subject to a strict construction, and no one can obtain the benefit of them who does not bring himself within their terms.[2] Thus, for example, the acts do not apply to every agent, but only to a factor or other agent employed in like mercantile transactions;[3] he must actually have been employed as such;[4] the goods must have been intrusted to him for sale;[5] his possession must have been with the consent of the owner, and not obtained by theft or trick;[6] the person who claims the protection of the statute must have acted in good faith,[7] without notice of the true owner's rights,[8] and he must have parted with value in the ordinary

[1] Rev. Stats. of New York, vol. III, p. 2006.

[2] Victor Sewing Mach. Co. v. Heller (1878), 44 Wis. 265; Stevens v. Cunningham (1862), 3 Allen (Mass.), 491.

[3] Thus in Heyman v. Flewker (1863), 13 Com. B. N. S. 519, 106 Eng. Com. L. 518, it is said that "the term 'agent' does not include a mere servant or care taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the act has taken its name." To like effect: Bush v. Fry (1888), 15 Ont. 122; City Bank v. Barrow (1880), 5 App. Cas. 664; Johnson v. Credit Lyonnais (1878), 2 C. P. Div. 224, 3 id. 32; Cole v. Northwestern Bank (1874), L. R. 9 C. P. 470, 10 id. 369.

[4] See First Nat. Bank v. Shaw (1874), 61 N. Y. 283; Mechanics' Bank v. Farmers' Bank (1875), 60 N. Y. 40; Farmers' Nat. Bank v. Atkinson (1878), 74 N. Y. 587; Davis v. Bigler (1869), 62 Pa. St. 242.

[5] Nickerson v. Darrow (1862), 5 Allen (Mass.), 419; Thacher v. Moors (1880), 134 Mass. 156.

[6] Soltau v. Gerdau (1890), 119 N. Y. 380, 23 N. E. R. 864; Prentice Co. v. Page (1895), 164 Mass. 276, 41 N. E. R. 280; Cahn v. Packet Co., [1899] 1 Q. B. 643.

[7] Cleveland v. Shoeman (1883), 40 Ohio St. 176; Price v. Wisconsin M. & F. Ins. Co. (1877), 43 Wis. 267.

[8] Macky v. Dillinger (1873), 73 Pa. St. 85; Dorrance v. Dean (1887), 106 N. Y. 203. See Price v. Insurance Co., *supra*.

course of business in reliance upon the factor's apparent authority.[1]

§ 170. Appearance of title by conduct — General estoppel. And finally, without going further into details, it may be said that whenever and however the true owner of goods by his conduct — his words, his acts, his failure to act — has reasonably led another person to appear to be the owner of his goods, or authorized to dispose of them, he will not be permitted to deny such ownership or authority to the prejudice of a third person who in good faith and with reasonable prudence has parted with value upon the strength of such appearances.[2]

IV.

Of Sales and Purchases by Persons Acting in a Representative Capacity.

§ 171. In general. — Again, it may be that the person who undertakes to buy or sell is acting, not on his own account, but as the representative of another; and something therefore should, perhaps, be said concerning the origin, nature and ex-

[1] Cleveland v. Shoeman, *supra*.

[2] See Freeman v. Cooke, 2 Exch. 654; Pickard v. Sears, 6 Adol. & El. 469, 33 Eng. Com. L. 257; Gregg v. Wells, 10 Adol. & El. 90, 37 Eng. Com. L. 71; Knights v. Wiffin, L. R. 5 Q. B. 660. In Leavitt v. Fairbanks (1899), 92 Me. 521, 43 Atl. R. 115, it appeared that Leavitt delivered a mare to one Sawyer to be kept through the winter and returned in good condition the next spring. Sawyer sold the mare to the defendant, who had no knowledge of plaintiff's title and no reason to suspect it. Plaintiff gave defendant no notice of his title for seventeen months after he knew of the sale, meanwhile endeavoring to obtain the price from Sawyer. *Held*, that his action was a ratification of Sawyer's sale, and furthermore that his long delay estopped him to set up title as against the *bona fide* purchaser for value.

In Grace v. McKissack (1873), 49 Ala. 163, a person sold and delivered property on condition that the title should remain in him until the price was paid or secured by a mortgage. A third person, proposing to buy the property from the vendee, informed the vendor of that fact, and asked him if he had any mortgage upon it. The vendor replied that he had none, and did not expect to have any; and said nothing as to his claim of title. The third person thereupon bought the property. *Held*, that the vendor was estopped to set up title against him. See also Stewart v. Munford (1878), 91 Ill. 58; Powers v. Harris (1880), 68 Ala. 409.

tent of the power of him who so undertakes to represent another, although the subject may not be strictly one involving the capacity of parties.

This general question of authority to buy and sell as agent has been fully discussed by the present writer in another place;[1] but a brief review of the subject seems germane to the present endeavor, and will be given.

§ **172. Nature of the authority.**— It will be obvious upon a slight consideration of the matter that the authority of one person to act for another in buying and selling personalty may be either (1) such as the law alone creates and confers, even without the consent of the person to be bound; or (2) such created and conferred by the act of the party to be represented. In the latter case, of authority conferred by act of party, the authority may have been conferred either (*a*) expressly, or it may have arisen (*b*) by implication from some other act, circumstance or condition.

It will be found, moreover, that somewhat different considerations are presented where the question is one of power to buy than where the power to sell is involved; and it will be convenient, therefore, to consider each question separately.

1. *Authority to Sell Personal Property.*

§ **173. How considered.**— Applying the distinction referred to in the preceding section, it will be convenient to consider, *first*, the question of the power to sell when conferred by law; and *second*, the power to sell when it arises either expressly or impliedly from the acts of the parties.

a. Authority to Sell Conferred by Law.

§ **174. Chief illustrations.**—With a single exception, perhaps, the question of the power to sell conferred by law does not greatly concern us. It will be found in later sections that a vendor of goods has, in many cases, a power conferred by

[1] See Mechem on Agency, §§ 335–362; §§ 363–370; and elsewhere in same work.

law to sell the goods, as the goods of his vendee, to enforce the payment of the price, and this question will there be fully discussed.[1] Aside from this, the chief instances of the kind of power now under consideration are: the power of the master of a ship, in case of absolute necessity, to sell the ship or cargo; the power of the pledgee to sell the goods pawned; the power of a landlord to distrain and sell for the payment of rent; the power of the sheriff or other similar officers to sell goods upon execution; the power of the tax collector to seize and sell goods for the payment of taxes; and other like cases of statutory authority, none of which falls within the field now being considered.

b. Authority to Sell Conferred by Act of Party.

§ 175. Express authority to sell.— The authority to sell may of course be conferred expressly and under a great variety of circumstances to which it is not necessary here to refer.[2] It may have been previously given or result from a subsequent ratification by the principal with full knowledge of the material facts — such a ratification being, in general, the equivalent of a prior authorization.[3] Such an authority is to be exercised for the benefit of the principal, and not, under any circumstances, for the personal benefit of the agent.[4] He will not be permitted, without the full knowledge and consent of his principal, to sell to himself, either directly or indirectly, or otherwise deal with himself on his principal's account.[5]

[1] See *post*, §§ 1621 *et seq.*

[2] See Mechem on Agency, § 335 *et seq.*

[3] Mechem on Agency, §§ 109–182.

[4] Mechem on Agency, §§ 344, 354. Thus, for example, he cannot set off against the price due his principal debts owing by himself, Mechem on Agency, § 344; Talboys v. Boston (1891), 46 Minn. 144, 48 N. W. R. 688; or sell or deliver the goods in payment of his own debt, or pledge them for his own debt, Mechem on Agency, § 354; Gould v. Blodgett (1881), 61 N. H. 115; Wilson v. Wilson (1897), 181 Pa. St. 80, 37 Atl. R. 117; Read v. Cumberland, etc. Co. (1894), 93 Tenn. 482, 27 S. W. R. 660; or take payment to himself for his principal's goods, McGrath v. Vanaman (1895), 53 N. J. Eq. 459, 32 Atl. R. 686; or accept a cancellation of his own debt in payment. Smith v. James (1890), 53 Ark. 135, 13 S. W. R. 701.

[5] Mechem on Agency, § 461.

Authority to *sell* can only justify such dispositions as are, in legal effect, sales, and it therefore does not warrant a pledge, a mortgage, or an exchange or barter.[1] If the authority be to sell, without stipulating as to the manner, it is to be construed as referring to a private and not to a public or auction sale.[2] If, on the other hand, a sale by auction is directed, a private sale would not be authorized.[3]

General power to sell, without restrictions, would carry with it implied power to fix the price and agree upon the terms, within the usual or reasonable limits.[4] The principal himself, however, may prescribe the price and terms, and his restrictions will be binding upon the agent and also upon third persons who are charged with notice. Mere private instructions, however, could not affect third persons actually ignorant of them, who have dealt with the agent in good faith and in the exercise of reasonable prudence;[5] though even here the terms or price fixed by the agent may be so unusual or unreasonable as to fairly put a prudent man upon his guard.[6]

[1] Mechem on Agency, §§ 356, 361, 352.

[2] Mechem on Agency, § 358.

[3] Mechem on Agency, § 358.

[4] Mechem on Agency. § 362; Daylight Burner Co. v. Odlin (1871), 51 N. H. 56, 12 Am. R. 45; Putnam v. French (1881), 53 Vt. 402, 38 Am. R. 682; Bigelow v. Walker (1852), 24 Vt. 149, 58 Am. Dec. 156; Watts v. Howard (1897), 70 Minn. 122, 72 N. W. R. 840; Smith v. Droubay (1899), 20 Utah, 443, 58 Pac. R. 1112; Taylor v. Bailey (1897), 169 Ill. 181, 48 N. E. R. 200. Where the only apparent limitation upon the agent's authority was to sell at "proper prices," the sale cannot be defeated because the principal claims that the price fixed by the agent was too low, unless it was so low as to plainly show fraud on his part. U. S. School Furniture Co. v. Board of Education (1897), — Ky. —, 38 S. W. R. 864.

[5] Mechem on Agency, § 362.

[6] Mechem on Agency, § 362. Thus where a traveling salesman offered to sell to a customer goods worth $860 for $382.50, it was held that the customer must have known that the salesman was joking or perpetrating a fraud upon his principal, and therefore the principal was not bound. Brown Grocery Co. v. Beckett (1900), — Ky. —, 57 S. W. R. 458.

In Brown v. West (1897), 69 Vt. 440, 38 Atl. R. 87, defendants were wholesale grocers, under contract with the manufacturers of certain goods not to sell below list prices. They employed a traveling salesman to sell these goods, and he was authorized to sell only at list prices, to make collections and receipt bills. A retailer, who knew of the contract, bought goods from the salesman, who allowed him discounts, though the goods were sold and bills rendered

Authority to sell upon a day named does not justify a sale at a later day;[1] and authority to sell upon a particular occasion does not warrant the inference of like authority several years later.[2]

Authority to sell raises no implication of authority to subsequently alter or modify the contract, rescind the sale, or discharge the purchaser from his liability;[3] or to release or compromise debts due the principal, or to turn out the property in payment of his debts.[4]

Like other authorities, the authority to sell is usually not one which the agent may delegate to another without his principal's consent.[5]

Where the authority is simply to solicit orders for goods, or negotiate for their sale, the agent would have no implied power to make an absolute contract of sale;[6] but even though, in fact, his authority is so limited, if the principal holds him out as having general authority to sell, the principal will be liable to innocent third persons who have made an absolute contract with the agent in reliance upon his apparent authority.[7]

§ 176. Implied authority to sell.— Although not expressly conferred, authority to sell may be implied from words or con-

at list prices. *Held*, that the retailer was bound to inquire as to the agent's authority to make discounts.

[1] Bliss v. Clark (1860), 16 Gray (Mass.), 60.

[2] Reed v. Baggott (1879), 5 Ill. App. 257.

[3] Mechem on Agency, § 360; Diversy v. Kellogg (1867), 44 Ill. 114, 92 Am. Dec. 154; Stilwell v. Mutual Life Ins. Co. (1878), 72 N. Y. 385; Adrian v. Lane (1879), 13 S. C. 183; Adams v. Fraser (1897), 49 U. S. App. 481, 27 C. C. A. 108.

Such authority may, of course, be conferred, expressly or by implication; and where the agent in selling has agreed that the buyer may return the goods, the principal by adopting and enforcing the contract ratifies that agreement, which thus formed a part of it. Babcock v. Deford (1875), 14 Kan. 408.

[4] Mechem on Agency, § 355; Smith v. Perry (1860), 29 N. J. L. 74; Powell v. Henry (1855), 27 Ala. 612; Nash v. Drew (1850), 5 Cush. (Mass.) 422.

[5] Mechem on Agency, § 185 *et seq.*; Bancroft v. Scribner (1896), 44 U. S. App. 480, 21 C. C. A. 352; Burke v. Fry (1895), 44 Neb. 223, 62 N. W. R. 476; National Cash Register Co. v. Ison (1894), 94 Ga. 463, 21 S. E. R. 228.

[6] Johnson Railroad Signal Co. v. Union Signal Co. (1892), 51 Fed. R. 85.

[7] Banks v. Everest (1886), 35 Kan. 687; Potter v. Springfield Milling Co. (1898), 75 Miss. 532, 23 S. R. 259.

duct which would reasonably lead to the inference that such authority existed.

§ 177. —— None implied from mere possession.— Authority to sell, however, is not to be implied from the mere possession of the goods. As has been already seen, there must be something more — some additional fact or circumstance which has clothed the possessor with the *indicia* of ownership or with apparent authority to sell.[1]

§ 178. —— None from mere relationship — Husband and wife — Parent and child.— So no authority to sell is ordinarily to be implied from the mere relationship of the parties. Thus the wife, merely because she is the wife, has no implied power to sell or dispose of her husband's property.[2] The mere fact that the husband is ill,[3] or temporarily absent,[4] does not enlarge her powers, though long-continued absence, and *a fortiori* an entire abandonment, would, of necessity, in respect of many articles of personalty, warrant the wife to sell.[5] Authority to sell may, of course, be inferred from conduct, prior recognition, subsequent ratification, and the like, as in the case of other agents.

So the husband, merely because he is the husband, has no implied authority to sell or dispose of the wife's property. She may make him her agent, as in the case of other agents, but he is not her agent simply because he is her husband.[6]

The same rules apply also to the relation of parent and child.

[1] See this subject discussed, *ante*, §§ 156, 157.

[2] Mechem on Agency, § 62; Alexander v. Miller (1851), 16 Pa. St. 215; Brown v. Railroad Co. (1863), 33 Mo. 309; Dunnahoe v. Williams (1866), 24 Ark. 264; Wheeler & Wilson Mfg. Co. v. Morgan (1883), 29 Kan. 519; Ness v. Singer Mfg. Co. (1897), 68 Minn. 237, 70 N. W. R. 1126. Wife has no implied power to lend the husband's property. Green v. Sperry (1844), 16 Vt. 390, 42 Am. Dec. 519.

[3] Alexander v. Miller, *supra*.

[4] Benjamin v. Benjamin (1843), 15 Conn. 347, 39 Am. Dec. 384; Krebs v. O'Grady (1853), 23 Ala. 726, 58 Am. Dec. 312; Butts v. Newton (1872), 29 Wis. 632.

[5] See Felker v. Emerson (1844), 16 Vt. 653, 42 Am. Dec. 532; Church v. Landers (1833), 10 Wend. (N. Y.) 79.

[6] See Mechem on Agency, § 63, and cases cited.

The child, simply because he is such, has no implied power to sell the parent's property; and the parent, by virtue of his relationship alone, would have no implied power to sell the property of the child.

A fortiori, the mere fact that one is nephew of another and works upon his farm gives him no right to sell that other's property.[1]

§ 179. —— None from authority to do different kind of acts.— Authority to sell, moreover, cannot be inferred from the mere fact that the person selling has even express authority to do acts of some other nature. Thus, an agent authorized to manage a business has therefrom no implied power to sell it;[2] and an agent authorized to solicit orders for goods by reference to samples which he carries with him has no implied power to sell the samples.[3]

2. *Authority to Buy Personal Property.*

§ 180. How considered.— In this case, also, it will be convenient to apply the distinction mentioned in a preceding section, and consider, *first*, the authority conferred by law; and *second*, the authority conferred, expressly or impliedly, by act of parties.

a. Authority to Buy Conferred by Law.

§ 181. Chief instances.— There are a few cases in which the law, by reason of the necessity of the case, confers upon one party the power to bind another, with whom he is in some way legally related, for the purchase of goods, even without the express consent and often notwithstanding the express dissent of the person to be bound. The most striking illustration of this authority is the power of the wife, under certain circumstances,

[1] Moffet v. Moffet (1894), 90 Iowa, 442, 57 N. W. R. 954.

[2] Holbrook v. Oberne (1881), 56 Iowa, 324; Vescelius v. Martin (1888), 11 Colo. 391, 18 Pac. R. 338. But see Carey Lumber Co. v. Cain (1893), 70 Miss. 628, 13 S. R. 239.

[3] Kohn v. Washer (1885), 64 Tex. 131, 53 Am. R. 745.

to pledge her husband's credit for necessaries. Allied to this, there has often been said to be, though probably erroneously, a similar power on the part of an infant child to pledge his father's credit. And compared to it, too, but probably also erroneously, is the power of the master of a ship to buy supplies upon the owner's credit.

§ 182. **Authority of wife to buy necessaries on husband's credit.**— A wife, merely because she is such, has no general authority as her husband's agent; though he may make her his agent as in other cases. But while she has no general power to bind him, the law, in one class of cases, gives her a special and unusual power, fitly designated as an "authority by necessity," to pledge her husband's credit, under certain circumstances, for those articles which the law has denominated "necessaries." His liability for necessaries has grown to be an important and extensive chapter of the law, and many pages would be required to adequately discuss it. The purpose here is simply to show its place in the general subject under discussion, and to notice only its most important features.

§ 183. —— **Where the parties are living together.**— While the husband and wife are living together, the wife has usually a sort of agency in fact to manage the domestic affairs, and to pledge her husband's credit for the purchase of such articles as are reasonably necessary and proper for family use, even though they might not all be strictly of the class known as necessaries.[1] This presumptive agency, however, is not an absolute one. The husband may, in general, supply his family as he pleases and keep the control of the purchases within his own hands. He may show, therefore, that he has never given the wife this apparent authority, or that, if she ever had it, it has been revoked upon proper notice. As stated in one case,[2] "the agency of the

[1] Vusler v. Cox (1891), 53 N. J. L. 516; Baker v. Carter, *post;* Phillips v. Sanchez (1895), 35 Fla. 187; Wagner v. Nagel (1885), 33 Minn. 348.

[2] Baker v. Carter (1890), 83 Me. 132, 21 Atl. R. 834, 23 Am. St. R. 764. See also Flynn v. Messenger (1881), 28 Minn. 208, 41 Am. R. 279; Bergh v. Warner (1891), 47 Minn. 250, 50 N. W. R. 77, 28 Am. St. R. 362.

wife to purchase necessaries is only presumptive, and may be disproved by the husband by showing that he had abundantly supplied the house with all things necessary and suitable, or that he had furnished the wife with ample ready money for the purpose, and requested her not to purchase on credit, or had provided suitable places where all things necessary could be had and forbidden her to purchase elsewhere; though the mere fact that he privately forbade her to act for him will not relieve him from liability, where it appears that he has recognized her agency, or has in some way allowed her to appear to have charge of his house. The husband, in the view of the law, is the head of the house, and has a right to control the affairs of his own household."

If, however, he made no provision for her in any way, then the wife would have the power to buy necessaries upon his credit, and he could not by any notice or countermand deprive her of the power.[1]

§ 184. —— Where the parties are living apart.— Where the husband and wife are living apart, somewhat different considerations apply.

If they are living apart because of the wife's misconduct or default, the husband is ordinarily freed from the liability to support her.[2]

If they are living apart because of the husband's fault, as where he has deserted her, driven her away, or rendered her home an unfit place for her to live, he is usually said to send his credit with her, and, if she is not otherwise supplied,[3] she may buy necessaries upon her husband's credit, and of this right no notice not to supply her can deprive her.[4]

[1] Keller v. Phillips (1868), 39 N. Y. 351; Woodward v. Barnes (1871), 43 Vt. 330; McGrath v. Donnelly (1889), 131 Pa. St. 549.

[2] Oinson v. Heritage (1873), 45 Ind. 73, 15 Am. R. 258; Brown v. Mudgett (1868), 40 Vt. 68; Sturtevant v. Starin (1865), 19 Wis. 285.

[3] If the wife has other adequate means, the rule is said not to apply. Hunt v. Hayes (1891), 64 Vt. 89, 23 Atl. R. 920, 33 Am. St. R. 917.

[4] Carstens v. Hanselman (1886), 61 Mich. 426, 28 N. W. R. 159, 1 Am. St. R. 606; Billing v. Pilcher (1847), 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523;

If they are living apart by consent, the husband is still under obligation to support his wife, and if in fact he does sufficiently supply her, he cannot be further bound; if he does not so supply her, she may pledge his credit, except where he has made an allowance agreed upon, which, though insufficient, was still the consideration upon which he gave his consent to the separate maintenance.[1]

Whoever supplies goods to the wife as necessaries, however, in the cases herein being considered, must be prepared to show that the husband had not supplied the wife and that the other circumstances exist which impose upon him the liability.[2]

§ 185. —— What constitute necessaries.— The term "necessaries" is not one having a precise legal import. It includes the various articles and services which are reasonably essential to the health and comfort of the wife, having regard to the means of the husband, the station in life, and the style of living to which the parties are accustomed. Food, drink, clothing, lodging, fuel, washing, medical, surgical and dental service or attendance[3] would probably everywhere be deemed necessaries; and so might domestic service under many circumstances,[4] and counsel fees where the services of counsel become necessary for the support or protection of the wife.[5]

But money borrowed to procure necessaries would not, at

Mitchell v. Treanor (1852), 11 Ga. 324, 56 Am. Dec. 421; Reynolds v. Sweetzer (1860), 15 Gray (Mass.), 78; Hultz v. Gibbs (1870), 66 Pa. St. 360.

[1] See Alley v. Winn (1883), 134 Mass. 77, 45 Am. R. 297; Crittenden v. Schermerhorn (1878), 39 Mich. 661, 33 Am. R. 440.

[2] The party supplying the wife living apart does so at his peril, and he must be prepared to show the facts that make the husband liable. Hare v. Gibson (1876), 32 Ohio St. 33, 30 Am. R. 568 [citing Cartwright v. Bate, 1 Allen, 514; Rea v. Durkee, 25 Ill. 414; Blowers v. Sturtevant, 4 Denio, 46; Breinig v. Meitzler, 23 Pa. St. 156; Gill v. Read, 5 R. I. 343; Bennett v. O'Fallon, 2 Mo. 69].

[3] Medical services: Mayhew v. Thayer (1857), 8 Gray (Mass.), 172. Dental services would seem to stand upon the same reasons. See Gilman v. Andrus (1856), 28 Vt. 241; Freeman v. Holmes (1879), 62 Ga. 556.

[4] See Phillips v. Sanchez (1895), 35 Fla. 187, 17 S. R. 363; Wagner v. Nagel (1885), 33 Minn. 348.

[5] See Wilson v. Ford (1868), L. R. 3 Ex. 63.

common law, be regarded as a necessary, even though actually used to buy necessaries.[1]

§ 186. Authority of infant child to buy necessaries on parent's credit.— The power of an infant child to buy necessaries upon his parent's credit presents somewhat different considerations. The parent is doubtless under something of a moral obligation to support his minor children; and statutes in many States impose a legal liability under many circumstances. But whether, in the absence of a statute, there is such a legal obligation that it may be made the basis of an action by one who has supplied the minor child with necessaries, is in dispute. Mr. Schouler, for example, concludes that there is no such legal liability, and that "either an express promise, or circumstances from which a promise by the father can be inferred, is essential."[2] In a late case in Iowa,[3] on the other hand, the legal obligation was recognized and enforced.

If the child resides at home, it is to be presumed that the father furnishes whatever is necessary and proper for his maintenance;[4] but where the child is absolutely not supplied, though at home, or is driven from home, or is temporarily away by his parent's authority and is unsupplied, the liability arises, if at all. If, on the other hand, the child has voluntarily abandoned his home where the parent is ready to supply him,[5] or is emancipated,[6] the liability does not exist.

[1] Skinner v. Tirrell (1893), 159 Mass. 474, 34 N. E. R. 692, 38 Am. St. R. 447, 21 L. R. A. 673.

[2] Schouler on Domestic Relations (5th ed.), § 241.

[3] Porter v. Powell (1890), 79 Iowa, 151, 44 N. W. R. 295, 18 Am. St. R. 353, 7 L. R. A. 176. See also Cooper v. McNamara (1894), 92 Iowa, 243, 60 N. W. R. 522; Dawson v. Dawson, 12 Iowa, 513. *Contra*, Kelley v. Davis (1870), 49 N. H. 187, 6 Am. R. 499; Farmington v. Jones (1858), 36 N. H. 271; Gordon v. Potter (1845), 17 Vt. 348; Freeman v. Robinson (1876), 38 N. J. L. 383, 20 Am. R. 399; Carney v. Barrett (1871), 4 Oreg. 171; McMillen v. Lee (1875), 78 Ill. 443; Owen v. White (1837), 5 Port. (Ala.) 435, 30 Am. Dec. 572; Bazeley v. Forder (1868), L. R. 3 Q. B. 559, per Cockburn, C. J.

Whether the moral obligation will supply consideration for a promise to pay: *Pro*, Jordan v. Wright (1885), 45 Ark. 237: *con*, Freeman v. Robinson, *supra*.

[4] See Schouler, Dom. Rel., § 241.

[5] See Schouler, Dom. Rel., § 241; Owen v. White (1837), 5 Port. (Ala.) 435, 30 Am. Dec. 572.

[6] Schouler, Dom. Rel., § 268, citing

Even though there be no legal liability, except upon an express promise or circumstances from which a promise can be inferred, the law is very liberal in construing the acts, the acquiescence, the failure to dissent, of the parent into an implied promise to respond.[1]

b. Authority to Buy Conferred by Act of Party.

§ 187. Express authority to buy.— The authority to buy, like the authority to sell already considered, may be conferred expressly and previously, or result from subsequent ratification; and the same general principles will apply to its construction. If the agent has a general power to buy, without restrictions, he may do all of those incidental things which usually accompany a purchase; as, for example, to agree upon the price and terms of sale, the time and method of delivery, and the like.[2]

He may, however, be lawfully limited by his principal with respect to quantity,[3] quality, kind or price,[4] or even as to the persons with whom he shall deal.[5] And, unless these limitations are intended to be secret, third persons, in their dealings with him, must observe them. He may, ordinarily, not buy on credit,[6] unless his principal has failed to supply with him the necessary funds.[7]

Nightingale v. Withington, 15 Mass. 272; Corey v. Corey, 19 Pick. 29; Hollingsworth v. Swedenborg, 49 Ind. 378; Varney v. Young, 11 Vt. 258; Johnson v. Gibson, 4 E. D. Smith, 231.

[1] Schouler, Dom. Rel., § 241.

[2] See Mechem on Agency, § 365.

[3] Mechem on Agency, § 366.

[4] Mechem on Agency, § 367.

[5] Mechem on Agency, § 368.

In Robinson Mercantile Co. v. Thompson (1897), 74 Miss. 847, 21 S. R. 794, it appeared that defendants telegraphed a cotton buyer, who was not their regular agent, to buy a certain quantity of cotton at certain places and from named parties at a stated price. The agent could not fill the order at the places named and bought elsewhere, from the plaintiffs. The defendants repudiated the purchase. *Held*, that authority given to a commission merchant to buy goods at a certain place and from certain parties did not authorize the purchase at other places and from other parties.

[6] Mechem on Agency, § 363.

In Liddell v. Sahline (1891), 55 Ark. 627, 17 S. W. R. 705, appellants were stockholders in a co-operative company which employed a general

[7] Mechem on Agency, § 364.

Like the agent authorized to sell, the agent authorized to buy will not be permitted, without the full knowledge and consent of his principal, to buy of himself, either directly or indirectly; or otherwise exercise his authority on his own account. Any such transaction is voidable at the option of the principal.[1]

Such an agent also is, in general, not permitted to delegate his authority.[2]

§ 188. Implied authority to buy. — But authority to buy may, in many cases, be implied, though it has not been expressly conferred. It may, for example, be found to be a suitable and necessary incident to some other power which was expressly given; as, for example, where one who has been given general authority to manage a business in which the use of teams was necessary, was held authorized to buy a team for that purpose.[3]

manager with power to buy and sell goods in accordance with certain provisions, which included a limitation upon purchases on credit. The manager bought on credit beyond the limit imposed. *Held*, that though a general agent has no power to buy on credit, yet if goods are delivered by plaintiffs without knowledge of the limitations, they are not bound by them.

In Welch v. Clifton Mfg. Co. (1899), 55 S. C. 568, 33 S. E. R. 739, an agent for the purchase of cotton bought on credit. It was claimed he had no authority. *Held*, that the manner in which he had conducted his principal's business for a long time could be shown to determine the scope of his authority; and that the retention of the goods by the principal after notice that they were bought on credit was a ratification.

In Littleton v. Loan, etc. Ass'n (1895), 97 Ga. 172, 25 S. E. R. 826, the defendants had an agent in another town whose business it was to buy and ship cotton to them. His authority to bind his principals was limited to drawing drafts upon them in favor of a specified bank, with bills of lading attached to the drafts, which the bank, by arrangement with the principals, cashed so as to supply the agent with money to pay for his purchases. The manager of the plaintiff corporation, knowing the extent of the authority possessed by defendant's agent, sold him cotton and took in payment the agent's individual check on the bank, which was dishonored. *Held*, that the plaintiff cannot recover from the principal without showing that he actually received the goods, and not even then if the principal had paid the agent by honoring the agent's draft.

[1] Mechem on Agency, § 462; Disbrow v. Secor (1889), 58 Conn. 35, 18 Atl. R. 981.

[2] Mechem on Agency, § 185 et seq.

[3] See Montgomery Furniture Co. v. Hardaway (1893), 104 Ala. 100, 16 S. R. 29.

In Heald v. Hendy (1891), 89 Cal.

It may be inferred also where it has been openly and notoriously exercised without the objection or with the acquiescence of the principal.[1] Liability for purchases may also be incurred by one who has either actively or passively caused or permitted himself to be held out as the principal,[2] and if he were really principal, he may be liable, though he was not known as such.[3]

Authority to buy in these cases is, of course, not an unlimited one; the goods must be suitable to the business as apparently conducted,[4] and there must be nothing so unreasonable in quantity or terms as to properly put a prudent man upon his guard.

§ 189. —— Not implied from mere relationship of parties. But authority to buy is not ordinarily to be inferred from the mere relationship of the parties. Thus, not speaking now of the law's authority to buy necessaries,[5] a wife has no implied power to buy goods generally upon her husband's credit,[6] nor has the husband power, simply because he is husband, to buy goods for the wife, or make improvements to her property upon her credit.[7] Either may make the other an agent, and it may be done by implication from acts, as in other cases, but no general authority arises merely from the relationship.

The same rules apply also in the case of parent and child.[8]

632, 27 Pac. R. 67, the superintendent of a mine agreed with third persons that the defendants, the owners of the mine, would pay for provisions furnished to the boarding-house where the miners boarded. *Held*, that where it is necessary to the operation of a mine that provisions be furnished to a boarding-house where the miners live, the superintendent has power to bind the mine operators for such necessary supplies.

[1] See Hirschmann v. Iron Range R. R. Co. (1893), 97 Mich. 384, 56 N. W. R. 842.

[2] See Feldman v. Shea (1899), — Idaho, —, 59 Pac. R. 537.

[3] See Hubbard v. Tenbrook (1889), 124 Pa. St. 291, 10 Am. St. R. 585, 2 L. R. A. 823; Watteau v. Fenwick, [1893] 1 Q. B. Div. 346; Simpson v. Patapsco Guano Co. (1896), 99 Ga. 168, 25 S. E. R. 94; Steele-Smith Grocery Co. v. Potthast (1899), — Iowa, —, 80 N. W. R. 517. But see Becherer v. Asher (1896), 23 Ont. App. 202.

[4] See Wallis Tobacco Co. v. Jackson (1892), 99 Ala. 460, 13 S. R. 120.

[5] Already considered, *ante*, §§ 182–185.

[6] See Mechem on Agency, § 62, and cases cited.

[7] See Mechem on Agency, § 63, and cases cited.

[8] See Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706; Bennett v. Gil-

V.

Sales by Persons Acting in an Official Capacity.

§ 190. In general.— Something ought also to be said, perhaps, concerning sales and purchases by persons acting in an official or *quasi*-official capacity and by authority of law, rather than in a private representative capacity and by authority of the person represented. The full treatment of such cases belongs, of course, to other treatises, but a few points may not be without significance here.

§ 191. Authority must be strictly construed.— It may, in the first place, appropriately be noticed that these official persons derive their authority from the law, which is supposed always to be open for investigation, and with the terms of which every person who deals with the officer is presumed to be familiar.[1] Express grants of power, moreover, are usually subjected to a strict construction and will be deemed to confer those powers only which are either expressly given or necessarily implied.[2] The fact that the same act, if done by a private agent, would have been binding upon his principal, is not conclusive of its validity against the public; for in the case of the private agent the full extent of the authority and limitations upon it may be known to the principal and agent alone, while in the case of the public agent his authority and its limitations are matters of public record with which every one may make himself acquainted.[3]

lette, 3 Minn. 423, 74 Am. Dec. 774; Sequin v. Peterson, 45 Vt. 255, 12 Am. R. 194; Hall v. Harper, 17 Ill. 82; Swartwout v. Evans, 37 Ill. 442; Burnham v. Holt, 14 N. H. 367.

[1] Mechem on Public Officers, § 506, citing Mayor of Baltimore v. Eschbach, 18 Md. 282; Mayor of Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; State v. Hays, 52 Mo. 578; State v. Bank, 45 Mo. 528; Lee v. Munroe, 11 U. S. (7 Cranch), 366; Clark v. Des Moines, 19 Iowa. 199, 87 Am. Dec. 423; Wallace v. Mayor, 29 Cal. 181; Sutro v. Pettit, 74 Cal. 332, 5 Am. St. R. 442; Day Land & Cattle Co. v. State, 68 Tex. 526; Tamm v. Lavalle, 92 Ill. 263.

[2] Mechem on Public Officers, §§ 511, 830; Green v. Beeson, 31 Ind. 7; Vose v. Deane, 7 Mass. 280; The Floyd Acceptances, 74 U. S. (7 Wall.) 666.

[3] Mechem on Public Officers, § 512; Mechem on Agency, § 292; Mayor of

If the law requires particular formalities, the officer, in his acts, must observe them;[1] if precedent conditions are prescribed they must be complied with;[2] and generally the officer can bind the public only while acting strictly within the scope of his authority as created, conferred and defined by law.[3]

§ 192. Officer must keep within the term and territory of his office.— It is evident also that the officer must keep within the territorial limits to which by law his authority extends, and that when he goes beyond such limits his official character and his official authority must be left behind.[4] It will likewise be evident that his authority must be limited in its exercise to that term or period during which he is by law invested with official character.[5]

§ 193. Officer cannot deal with himself.— It is a rule of inflexible application that the public like the private agent shall not, without the full and intelligent consent of his principal, deal with himself on his principal's account, or exercise his authority for his own profit or advantage. Without such knowledge and consent, therefore, an agent authorized to sell property for his principal cannot sell to himself; an agent authorized to buy for his principal cannot buy of himself; and an agent authorized to buy or sell for his principal cannot buy or sell for himself.[6]

This rule applies in all its force to such public or *quasi*-public officers as administrators, executors, guardians, sheriffs, trustees, judges of probate, county treasurers, and the like.[7]

§ 194. Purchases at execution, tax and other similar sales.— The principles above referred to find constant illus-

Baltimore v. Eschbach, 18 Md. 282; Mayor of Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; State v. Hays, 52 Mo. 578.

[1] Mechem on Public Officers, § 831.

[2] Mechem on Public Officers, § 833.

[3] Mechem on Public Officers, § 834.

[4] See Mechem on Public Officers, § 508.

[5] See Mechem on Public Officers, §§ 509, 510.

[6] See Mechem on Agency, §§ 454–472; Mechem on Public Officers, §§ 839, 840.

[7] Mechem on Public Officers, § 840.

tration in the case of sales made upon execution and other similar writs. A sale made under such a lien, it is said,[1] "can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale. It is the duty of the purchaser to satisfy himself, prior to the purchase, respecting the title of the defendant and the sufficiency of the proceedings to transfer it, for the maxim of *caveat emptor* is unquestionably applicable both to judicial and to execution sales. The title acquired by a purchaser, even when the proceedings are valid, is that only to which he would succeed by a conveyance from the defendant in the writ made either at the time of the sale where it is not supported by any antecedent lien, otherwise at the date of the attaching of such lien. If one not a party to the suit has an interest in the property, an execution sale will not defeat it, though such property was levied upon while in his possession."

The same rule applies to tax sales. "The rule *caveat emptor* applies to the purchaser. He takes all the risks of his purchase, and if he finds in any case that he has secured neither the title he bid for, nor any equitable claim against the owner, the State may, if it see fit, make reparation itself; but it has no more authority to compel the owner of the land to do so than to exercise the like compulsion against any other person."[2]

No guaranty, moreover, is ordinarily available by the purchaser; for neither the officer,[3] nor the public which he represents,[4] impliedly warrants the validity of the title which he assumes to convey.

§ 195. Purchases at executors', administrators' and guardians' sales.— Like general principles apply to sales by executors and administrators in many States. For while, at common law, the representative took such title to the personal estate of the decedent that he might, in many cases, transfer

[1] Freeman on Executions (3d ed.), § 335.

[2] Cooley on Taxation (2d ed.), p. 553.

[3] Cooley on Taxation (2d ed.), p. 476, note.

[4] Cooley on Taxation (2d ed.), p. 818.

an unimpeachable title to a *bona fide* purchaser, even though he made himself liable to the persons interested in the estate, as for a *devastavit*, the power of the representative in many States is now so limited by statute that the purchaser must beware, and an unauthorized sale will transfer no title.[1]

And so in the case of the guardian. "No doubt is entertained," it is said,[2] "of the competency of a guardian's power over the disposition of the personal estate, as between him and a *bona fide* purchaser, unless restrained by statute. Although the guardian is liable on his bond for any abuse of this power, yet the vendee takes a good title if he has no notice of the guardian's fraud. . . But many States have enacted statutes avoiding all sales of a ward's property by the guardian if made without order of court, whether the purchaser have knowledge or not that such property belongs to a ward. In such case, if a guardian sell without authority, the sale is voidable at the option of the ward on reaching majority."

§ 196. Sales by trustees.— Doctrines of like general character apply to sales by trustees. "It is a universal rule," it is said,[3] "that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, *whether he have notice or not;* for in such case no wrong or pecuniary loss can fall upon him in compelling him to execute the trust to which the property that came to him without consideration was subject."

"Of course," it is further said,[4] "the opposite proposition is also true, that a purchaser for a valuable consideration, with-

[1] See the subject fully discussed in Woerner on Administration (2d ed.), § 331.

[2] Woerner on Guardianship, p. 179.

[3] Perry on Trusts (5th ed.), § 217.

[4] Perry on Trusts, § 218.

out actual or constructive notice of the trust, holds the property discharged of the interest of the *cestui que trust*." But to constitute one such a purchaser, "he must show an actual conveyance, and not merely an agreement for a conveyance; and it must be shown that the consideration named in the deed was paid in good faith;" while "notice must be positively and affirmatively denied, and not evasively or inferentially."[1]

[1] Perry on Trusts, § 219.

CHAPTER IV.

OF THE THING SOLD — WHAT MAY BE BOUGHT AND SOLD.

§ 197. What may be sold.
198. No present sale until chattel ascertained.
199. Thing sold must be in existence.
200, 201. Things potentially in existence.
202. Things not yet acquired by vendor.
203. Sales for future delivery.

§ 197. What may be sold.— Sale has been seen to be, in substance, the transfer of the absolute title to a chattel for a price. Who may sell, has already been considered. Attention will now be given to the consideration of what, in general, may be the subject-matter of a sale. The question at present will not be what sales are valid under particular circumstances, but, what things in general may be sold. And for this chapter, the subject will be considered without reference to the requirements of the statute of frauds — a matter reserved for a later chapter.[1]

Starting, then, with the simplest form, the general rule may be said to be that anything of value then belonging to the seller and actually or potentially in existence may be made the subject-matter of a sale. It is not necessary, it has been said,[2] "that the subject of sale should have a physical and corporeal existence and be susceptible of manual delivery; for, provided it have an actual value, however intangible it may be, it may nevertheless be sold.[3] Thus, a license to manufacture patented machines,[4] or a copyright to print and sell a manuscript, even of as incorporeal a substance as poetry or metaphysics, may be sold."[5]

So, also, the good-will of a business, whether conducted by a

[1] See *post*, § 329 *et seq.*

[2] Story on Sale (4th ed.), § 187.

[3] Citing Pothier, Contrat de Vente, No. 6.

[4] Citing Brooks v. Byam (1843), 2 Story, C. C. 525, 4 Fed. Cas., p. 261.

[5] Citing 2 Blackstone, Com. 405–408 and notes.

single individual[1] or a partnership;[2] the good-will of a newspaper route;[3] a trade-mark;[4] or, in some cases, a seat in a stock exchange or board of trade,[5] may be made the subject of a sale. As stated in one case,[6] "a mere privilege may be the subject of sale, if the purchaser is willing to run the risk of failing to enjoy it."

Passing next more fully into details, it may be noticed that —

§ 198. No present sale until thing to be sold is ascertained. — In order that there may be a present sale, it is the first requisite, so far as the subject-matter of the sale is concerned, that the thing sold shall be ascertained and agreed upon by the parties. This rule, "that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale, is one that is founded on the very nature of things."[7]

There may, of course, be contracts *for* the sale of goods not yet ascertained, as where the *kind* of goods is described, or manifested by sample, while the "individuality of the thing to be delivered" is left for subsequent determination; and many important rules are hereafter to be dealt with in connection with such "subsequent appropriation," as it is called.[8] The point here to be emphasized is, that the title to a chattel cannot pass until the identity of that chattel has been determined.

§ 199. Must be a thing in existence to be sold. — It is equally obvious that there can be no present sale where there is nothing existing to be sold. Parties may undoubtedly, as will be seen in a later section, contract for the future sale of an article not yet acquired or not yet in existence, but a present transfer of the title to that which is not, is clearly an im-

[1] Tweed v. Mills (1865), L. R. 1 Com. Pl. 39.

[2] See Mechem's Elem. of Partnership, §§ 87–89, and cases cited.

[3] Hathaway v. Bennett (1854), 10 N. Y. 108, 61 Am. Dec. 739.

[4] Warren v. Thread Co. (1883), 134 Mass. 247.

[5] See Clute v. Loveland (1885), 68 Cal. 254; Hyde v. Woods (1876), 94 U. S. 523, 24 L. ed. 264; In re Werder (1883), 15 Fed. R. 789; Barclay v. Smith (1883), 107 Ill. 349, 47 Am. R. 437; Thompson v. Adams (1880), 93 Pa. St. 55; Pancoast v. Gowen, id. 66.

[6] Hathaway v. Bennett, *supra*.

[7] Blackburn on Sale, p. 124.

[8] See *post*, §§ 721–752.

possibility. Hence, if at the time of the negotiation the thing contemplated had, contrary to the belief of the parties, never had any existence, or if it had, contrary to their belief, already ceased to exist, there is clearly no sale.[1] This rule, as is said by Mr. Benjamin,[2] is "sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold; sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties, being founded on a mutual mistake of fact, was really no assent; there was no subject-matter for a contract, and the contract was therefore never completed." Mr. Benjamin cites also Pothier,[3] who says: "There must be a thing sold, which forms the subject of the

[1] Strickland v. Turner, 7 Ex. 208; Hastie v. Couturier, 9 Ex. 102; Emerson v. European, etc. Ry. Co., 67 Me. 387, 24 Am. R. 39; Dexter v. Norton, 47 N. Y. 62, 7 Am. R. 415.

In Gibson v. Pelkie, 37 Mich. 380, where the parties were dealing in reference to a judgment which in fact did not exist, Graves, J., said: "There was no subject-matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance there was no substance. They made no contract, because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence." Citing Allen v. Hammond, 11 Pet. (U. S.) 63; Suydam v. Clark, 2 Sandf. (N. Y.) 133; Gove v. Wooster, Lalor's Suppl. (N. Y.) 30; Smidt v. Tiden, L. R. 9 Q. B. 446; Couturier v. Hastie, 5 H. L. 673; Hazard v. New England Ins. Co., 1 Sumn. (U. S. C. C.) 218; Silvernail v. Cole, 12 Barb. (N. Y.) 685; Sherman v. Barnard, 19 Barb. (N. Y.) 291.

[2] Benjamin on Sales, § 77.

[3] Contrat de Vente, No. 4.

In Bates v. Smith, 83 Mich. 347, 47 N. W. R. 249, Long, J., says: "It is essential to the validity of every executed contract of sale that there should be a thing or subject-matter to be contracted for. And if it appears that the subject-matter of a contract was not and could not have been in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party. Strickland v. Turner, 7 Exch. 208; Hastie v. Couturier, 9 id. 102, 5 H. L. Cas. 673; Franklin v. Long, 7 Gill & J. (Md.) 407. A mere possibility or contingency, not founded upon a right or coupled with an interest, cannot be a subject of a present sale, though it may be of an executory agreement to sell. Purcell v. Mather, 35 Ala. 570; Low v. Pew, 108 Mass. 347, 11 Am. R. 357. Though the subject-matter of the agreement has neither an actual nor potential existence, such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover the damages. Hutchinson

contract. If, then, ignorant of the death of my horse, I sell it, there is no sale, for want of a thing sold. For the same reason, if, when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly or in great part burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it."

§ 200. Things potentially in existence.— A valid sale, however, may be made of a thing which, though not yet actually in existence, is reasonably certain to come into existence as the natural increment, probable result or usual incident of something already in existence, and then belonging to the vendor, and the title will vest in the buyer the moment the thing comes into existence.[1] Things of this nature are said to have a potential existence.[2] "It is frequently held," says Peters, J.,[3] "that a man may sell property of which he is potentially but not actually possessed. He may make a valid sale of the wine that a vineyard is expected to produce; or the grain a field may grow in a given time; or the milk a cow may yield during a coming year; or the wool that shall thereafter grow upon sheep; or what may be taken at the next cast of a fisherman's net;[4] or fruits to grow; or young animals not yet in existence;[5] or the

v. Ford, 9 Bush (Ky.), 318, 15 Am. R. 711; Pierce v. Emery, 32 N. H. 484." But see Dickey v. Waldo, 97 Mich. 255, 23 L. R. A. 449.

[1] Low v. Pew, *supra;* Emerson v. European, etc. Ry. Co., 67 Me. 387, 24 Am. R. 39; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. R. 63, 25 Pac. R. 52; Arques v. Wasson, 51 Cal. 620, 21 Am. R. 718; Dickey v. Waldo, *supra.*

[2] "Things have a potential existence which are the natural product or expected increase of something already belonging to the vendor." Hutchinson v. Ford, *supra.*

[3] In Emerson v. Railway Co., *supra.*

[4] This illustration of the next cast of a fisherman's net, though a common one (see Benjamin on Sales, § 84), is not accurate. Low v. Pew, *supra.*

[5] A contract that all the colts to be foaled by certain mares sold by A to B, and kept in A's stables under B's care, were to belong to B, is a valid contract of sale, and not void as against creditors for want of delivery. Hull v. Hull, 48 Conn. 250, 40 Am. R. 165. Plaintiff's mare having been served by defendant's stallion, plaintiff executed a written agreement to pay defendant $20 in twelve months if the mare proved with foal,

good-will of a trade, and the like.[1] The thing sold, however, must be specific and identified; it must be, for instance, the product of a particular vineyard or field, or the wool from a particular sheep. These must also be owned at the time by the vendor. A person cannot sell the products of a field which

"colt holden for payment." *Held*, that the agreement was a mortgage of the colt. Sawyer v. Gerrish, 70 Me. 254, 35 Am. R. 323. Owner of a mare may, during gestation, make a valid contract for sale of the colt. McCarty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262. A valid sale may be made of the first female colt which a mare, then owned by grantor, may thereafter produce. Fonville v. Casey, 1 Murph. (N. C.) 389, 4 Am. Dec. 559.

But in Bates v. Smith, 83 Mich. 347, 47 N. W. R. 249, it was held that a contract by which A was to have a half interest in the colt to be produced by subsequently breeding B's mare to A's stallion, conveyed no such title to the colt that it could operate as against C, who bought the mare, while in foal, with notice that she had been bred to A's stallion but without notice of this contract. Such notice was not sufficient to put C upon inquiry as to A's rights.

[1] Wages to be earned and money to become due under an existing contract or employment may be assigned, though employment is for no definite time, but not if there be no present contract of service. Low v. Pew, 108 Mass. 347, 11 Am. R. 357; Hartley v. Tapley, 2 Gray (Mass.), 565; Mulhall v. Quinn, 1 Gray (Mass.), 105, 61 Am. Dec. 414; Kane v. Clough, 36 Mich. 436, 24 Am. R. 599; Weed v. Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115; Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220; Stott v. Franey, 20 Oreg. 410, 23 Am. St. R. 132, 26 Pac. R. 271; Adler v. Railroad Co., 92 Mo. 242, 4 S. W. R. 917; Provencher v. Brooks, 64 N. H. 479, 13 Atl. R. 641; Field v. Mayor, 6 N. Y. 179, 57 Am. Dec. 435. See Gragg v. Martin, 12 Allen (Mass.), 498, 90 Am. Dec. 164. But accounts to be made in future years by a physician in his practice (Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646), or of a blacksmith (Purcell v. Mather, 35 Ala. 570, 76 Am. Dec. 307), are not assignable. A merchant may execute a valid mortgage on "all future book accounts." Dunn v. Swan, 115 Mich. 409, 73 N. W. R. 386. The unearned salary of a public office may not be assigned, such assignments being contrary to public policy. Bliss v. Lawrence, 58 N. Y. 442, 17 Am. R. 273; Mechem on Pub. Off., § 874; Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 19 Am. St. R. 507, 25 N. E. R. 855, citing many cases; Schwenk v. Wyckoff, 46 N. J. Eq. 560, 19 Am. St. R. 438, 20 Atl. R. 259.

Goods purchased to replace those sold from a mortgaged stock are covered by the mortgage as of its date. McLoud v. Wakefield, 70 Vt. 558, 43 Atl. R. 179.

Fruit to be grown on trees now owned by vendor may be sold. Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. R. 63, 25 Pac. R. 52; Arques v. Wasson, 51 Cal. 620, 21 Am. R. 718; Dickey v. Waldo, 97 Mich. 255, 23 L. R. A. 449.

Cheese to be made from the milk of cows now owned by grantor may be sold. Van Hoozer v. Cory, 34 Barb. (N. Y.) 12.

he does not own at the time of sale, but which he expects to own."[1]

§ 201. ——. "But," on the other hand, as is said by Morton, J., "a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus, a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest."[2]

§ 202. **Things not yet acquired by vendor.**— As a general rule, *at law*, there can be no present sale of things not yet owned by the vendor, and not potentially in existence, as explained in the last section. "The common-law maxim is conclusive upon the point. *Nemo dat quod non habet.*"[3] "A mere possibility or expectancy, not coupled with any interest in or growing out of property, cannot be made the subject of a valid sale."[4] "At law, although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken."[5] These statements sufficiently indicate the rigor of the rule at law. "But though the actual *sale* is void," says Mr. Benjamin,[6] "the agreement will

[1] Child cannot make valid sale of his expectant interest in his parent's estate during the latter's life-time. Wheeler v. Wheeler, 2 Metc. (Ky.) 474, 74 Am. Dec. 421: Read v. Mosby, 87 Tenn. 759, 11 S. W. R. 940.

[2] Low v. Pew, 108 Mass. 347, *supra.*

[3] Per Peters, J., in Emerson v. European & N. A. Ry. Co., 67 Me. 387, 24 Am. R. 39.

[4] Per Judge, J., in Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646.

[5] Per Lord Chelmsford in Holroyd v. Marshall, 10 H. L. Cas. 191; Williston's Cases on Sales, 10. See, as to the general rule at law, Jones on Chattel Mortgages (4th ed.), § 138 *et seq.*; Hutchinson v. Ford, 9 Bush (Ky.), 318, 15 Am. R. 711: Gittings v. Nelson, 86 Ill. 591; Borden v. Croak, 131 Ill. 68, 22 N. E. R. 793, 19 Am. St. R. 23: Ferguson v. Wilson, 122 Mich. 97, 80 N. W. R. 1006.

[6] Benjamin on Sale (6th Am. ed.), § 80.

take effect if the vendor, by some act done after his acquisition of the goods, clearly shows his intention of giving effect to the original agreement, or if the vendee obtains possession under authority to seize them."[1] This question arises most frequently at the present time in controversies between the creditors of the vendor and his mortgagee or vendee of the goods; and in respect, particularly, to mortgages upon such after-acquired goods, and crops growing or to be grown, has often been considered.[2]

[1] See Jones on Chattel Mortgages (4th ed.), § 158 *et seq.;* Cook v. Corthell, 11 R. I. 482, 23 Am. R. 518; Moore v. Byrum, 10 S. C. 452, 30 Am. R. 58; Williams v. Briggs, 11 R. I. 476; Congreve v. Evetts, 10 Exch. 298; Carr v. Allatt, 3 H. & N. 964; Chidell v. Galsworthy, 6 C. B. (N. S.) 470; Baker v. Gray, 17 C. B. 462; Moody v. Wright, 13 Metc. (Mass.) 29, 46 Am. Dec. 706; Chapman v. Weimer, 4 Ohio St. 481. As to the nature of the new act required, see Head v. Goodwin, 37 Me. 181; Griffith v. Douglass, 73 Me. 532, 40 Am. R. 395.

[2] Much uncertainty and conflict exists in the authorities upon the question of mortgages and sales of goods not yet acquired. See the question fully discussed in Jones on Chat. Mortg. (4th ed.), §§ 138–175.

A crop planted on one's own land, or on land let to him, as well as a crop planted and in process of cultivation, is the subject of a valid mortgage. Rawlings v. Hunt, 90 N. C. 270.

A chattel mortgage can only operate upon property in actual existence at the time of its execution. A chattel mortgage can have no valid operation upon a crop of grain given at or about the time of planting the same, and before it is up and has any appearance of a growing crop. The property attempted to be mortgaged in such case cannot be said to be in existence; the subject-matter not being *in esse*, there is nothing for it to operate upon. Comstock v. Scales, 7 Wis. 159. See also Merchants' Bank v. Lovejoy, 84 Wis. 601, 55 N. W. R. 108; McMaster v. Emerson, — Iowa, —, 80 N. W. R. 389.

A mortgage executed by a tenant on the crops to be raised by him on a tract of ground leased by him is valid against his execution creditors; but they may sell the equity of redemption. Headrick v. Brattain, 63 Ind. 438.

A mortgage of future crops cannot operate at the time of its execution, because the crops are not then in existence; but, as soon as the crops grow, the lien of the mortgage attaches. Butt v. Ellett, 19 Wall. (86 U. S.) 544.

A contract between a farmer, engaged in raising corn, and a grain dealer, made whilst corn was growing in the field, whereby the farmer sold to the dealer a certain quantity of corn, at an agreed price, to be delivered when called for, the purchaser to give ten days' notice of the time he would call for it, and a part of the purchase-money was paid at the time of making the contract, is an absolute sale of corn, to be delivered in the future, and not a contract for a future sale. And in such

In equity, however, conveyances of future-acquired goods are often enforced, even though the goods have not yet been de-

a case the purchaser is bound to give notice of his readiness to receive the corn within a reasonable time; and if he fails to do so, the seller may offer to deliver the corn without such notice, and the purchaser is bound to accept and pay the contract price for it. A contract made when corn is growing in the field, for the sale of a certain amount of corn at a stipulated price to be delivered in the future, is not illegal, although the judgment of the parties as to the prospect of a corn crop may have controlled them, more or less, in making the contract. Sanborn v. Benedict, 78 Ill. 309.

An agreement in the spring, before the existence of a crop, to give another a lien upon the crop to be raised that year, for property purchased and for advances, or that the crop shall belong to the creditor until he is paid, cannot operate upon the crop after being raised, as a transfer by way of pledge or mortgage or otherwise, until at least after possession taken by the creditor, and before possession so taken the crop will be liable to an execution against the debtor. Gittings v. Nelson, 86 Ill. 591.

A mortgage may be made of a part of a growing crop, if the part mortgaged be so described as to be identified by parol evidence; and whether so identified or not is a question for the jury under the proof. Stephens v. Tucker, 55 Ga. 543.

There can be no valid sale or mortgage of a portion of a crop not planted; therefore, an obligation dated 25th of December, 1874, to deliver certain cotton of the next year's crop — the crop of 1875 — passes no title to the obligee. Redd v. Burrus, 58 Ga. 574.

A mortgage on a crop to be afterwards planted, unlike a mortgage on a growing crop, does not pass to the mortgagee the legal title, but creates only an equitable lien, which will not support an action of detinue for the recovery of the crop after it has matured and been gathered, until, at least, there has been a delivery under the mortgage. A crop must be considered and treated as a growing crop from the time the seed are deposited in the ground, as at that time the seed lose the qualities of a chattel, and become a part of the freehold, and pass with a sale of it. Wilkinson v. Ketler, 69 Ala. 435.

At common law, unplanted crops, or other things not having an existence, actual or potential, were not the subject of sale, assignment or mortgage; but in a court of equity such sale, assignment or mortgage creates an equitable interest which attaches to the property when it comes into existence or is acquired, and which the court will enforce and protect against all other persons than *bona fide* purchasers without notice; and for the conversion or illegal disposition of the property, with notice of the lien, an action on the case may be maintained. Hurst v. Bell, 72 Ala. 336. See also Mayer v. Taylor, 69 Ala. 403; Collier v. Faulk, 69 Ala. 58; Electric Lighting Co. v. Rust, 117 Ala. 680, 23 S. R. 751.

A contract of sale of a crop to be thereafter raised, harvested and threshed, made before the seed was sown, is inoperative as a sale against a levy upon the growing crop at the

livered to or obtained by the vendee, after their acquisition, in pursuance of the contract.[1]

suit of the seller's creditor. Welter v. Hill, 65 Minn. 273, 68 N. W. R. 26.

The lessees of a farm who agreed in the lease that they would fodder the stock on the farm with the hay which should grow thereon, and that they would not sell, dispose of or carry away, or suffer to be carried away, from the farm any of the hay without the consent of the lessors, gave a bill of sale to a third person of hay grown on the farm after the making of the lease, and he took possession. *Held*, that no title passed to him, and he had no insurable interest, although he intended to carry on the farm and not to carry off the hay. Heald v. Builders' Ins. Co., 111 Mass. 38.

A mortgage on a crop to be planted, and to secure payment for supplies necessary to enable the mortgagor to "make the crop," is valid even as against creditors. Watkins v. Wyatt, 9 Baxt. 250, 30 Am. R. 63, note; Hall v. Glass, 123 Cal. 500, 56 Pac. R. 336.

A mortgage of a growing crop is valid. Cotten v. Willoughby, 83 N. C. 75, 35 Am. R. 564.

The lessee of land in possession executed a mortgage of the crops to be raised by him the coming season, and which were not yet planted. *Held*, that the mortgage was valid. Arques v. Wasson, 51 Cal. 620, 21 Am. R. 718.

A contract in writing, dated in December, by which a debtor, in consideration of indulgence, gave to his creditor "a mortgage on all my (his) cotton, corn and wheat that I may raise during the then next year, to secure the payment of the debt; and in default of payment by the 1st of November next, then I authorize the said" creditor or his agent to "take all the crops raised by me," was held a good and enforceable lien upon the crops mentioned therein, although they had not been planted when the contract was made, the mortgagee having taken the property into his possession after it is acquired and before the rights of others as creditors or purchasers have attached thereon. Moore v. Byrum, 10 S. C. 452, 30 Am. R. 58.

A mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against a purchaser of the crop, for it or its value. Hutchinson v. Ford, 9 Bush, 318, 15 Am. R. 711.

[1] Jones, Chat. Mortg. (4th ed.), §§ 170–175; Mitchell v. Winslow, 2 Story (U. S. C. C.), 644, 17 Fed. Cas., p. 527; Butt v. Ellett, 19 Wall. (U. S.) 544; Apperson v. Moore, 30 Ark. 56, 21 Am. R. 170; Pennock v. Coe, 23 How. (U. S.) 117; Brett v. Carter, 2 Low. (U. S. C. C.) 458, 4 Fed. Cas., p. 67; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. R. 644; Sillers v. Lester, 48 Miss. 513; Booker v. Jones, 55 Ala. 266.

In Rochester Distilling Co. v. Rasey (1894), 142 N. Y. 570, 37 N. E. R. 632, 40 Am. St. R. 635, the subject was fully discussed. The syllabus gives the conclusion reached and is as follows:

"A chattel mortgage cannot, as a matter of law, be given future effect as a lien upon personal property which at the time of the delivery of the mortgage was not in existence, actually or potentially, when the rights of creditors of the mortgagor have intervened; the mortgage can

§ 203. Contracts of sale for future delivery.—It was at one time thought, in England,[1] that contracts for the sale and future delivery of goods which the vendor did not then have, or which he had no reasonable expectation of receiving by consignment or otherwise, but which he intended to go into the market and buy, were not valid contracts, but mere wagers on the price of the goods. But while this form of contract may afford easy opportunity for wagering, it is now well settled, both in England and the United States, as will be more fully seen hereafter,[2] that such contracts are not necessarily invalid, but are valid or not according to the actual intention of the parties.[3] The rule has been stated by the court in Indiana as

only operate on property in actual existence at the time of its execution.

"While such a mortgage may, as between the parties, be regarded in equity as an executory agreement to give a lien when the property comes into existence, some further act thereafter is requisite to make it an actual and effectual lien as against creditors.

"Crops which are the annual product of labor, and of the cultivation of the earth, have no actual or potential existence before a planting.

"The lessee of certain farm lands executed a chattel mortgage, by its terms covering, among other things, all the potatoes and beans 'which are now . . . planted or which are hereafter . . . planted during the next year.' The greater part of the planting of potatoes and all that of the beans was done after the delivery of the mortgage. After the planting the growing crops were levied upon and sold under an execution against the lessee, and plaintiff became the purchaser. The mortgagor subsequently foreclosed his mortgage and sold said crops to defendant, who took possession. In an action to recover possession, *held*, that the levy by the sheriff operated to transfer to him possession of the crops; that in the absence of proof of any act by the parties to the mortgage to create an actual lien as against such possession, the equities of the mortgagee were ineffectual for any purpose; and that plaintiff was entitled to the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage."

[1] Bryan v. Lewis, Ry. & Moo. 386, overruled in Hibblewhite v. McMorine, 5 M. & W. 462.

[2] See *post*, §§ 1030–1038.

[3] Irwin v. Williar, 110 U. S. 499; Hatch v. Douglas, 48 Conn. 116, 40 Am. R. 154; Whitesides v. Hunt, 97 Ind. 191, 49 Am. R. 441; Gregory v. Wendell, 39 Mich. 337, 33 Am. R. 390; Conner v. Robertson, 37 La. Ann. 814, 55 Am. R. 521; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. R. 745; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. R. 573; Seeligson v. Lewis, 65 Tex. 215, 57 Am. R. 593; Wall v. Schneider, 59 Wis. 352, 48 Am. R. 520; Sondheim v. Gilbert, 117 Ind. 71, 10

follows: "Where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance and not the shadow, and if the parties mutually understood and intended that the purchaser should pay for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction; and the fact that the purchaser is required to deposit a margin and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin and increase the same, like the purchaser, in order to secure the delivery at maturity, does not vitiate the contract. But if, at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price — if the price should decline the purchaser paying the difference, if it should rise the seller paying the advance, the contract price being the basis upon which to calculate differences, — in such a case it would be a gambling contract and void and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time."[1] It is not enough, as will be more fully seen hereafter, to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences. The burden of showing the invalidity of the contract rests upon the party asserting it.[2]

Am. St. R. 23; McGrew v. Produce Exchange, 84 Tenn. 572, 4 Am. St. R. 771; In re Taylor, 192 Pa. St. 304, 309, 43 Atl. R. 973, 975.

As to the general rule and the effect of the Illinois statute, see Clews v. Jamieson (1899), 38 C. C. A. 473, 96 Fed. R. 648; Wolf v. Nat. Bank, 178 Ill. 85, 52 N. E. R. 896. A contract between two stock dealers for differences is contrary to the gaming act, notwithstanding that the contract gives the buyer or seller an option to demand delivery or acceptance of the stocks. In re Gieve, [1899] 1 Q. B. 794.

[1] In Whitesides v. Hunt, *supra*.

[2] See *post*, § 1032; Irwin v. Williar, *supra;* Crawford v. Spencer, *supra*.

CHAPTER V.

OF THE PRICE.

§ 204. Necessity of a price.
205. —— Executory contracts.
206. —— Executed contracts.
207. Where price not agreed upon, reasonable value will determine.
208. Market price — Market controlled by monopolistic combination.
209. Other methods of fixing price.
210, 211. Price must be fixed with certainty.
212, 213. Price to be fixed by valuers.
214. Payment of the price.

§ 204. Necessity of a price.— A distinguishing feature of a sale, as has been seen, is that it is a transfer of the absolute title to a thing for a price in money or its equivalent.[1] There can therefore be no valid sale unless this price has been determined upon by the parties themselves, either expressly or impliedly, or unless some means or method be agreed upon by the parties or established by law by which the price may be determined.[2]

§ 205. —— Executory contracts.— Hence in the case of executory contracts, where parties are negotiating in respect of a sale and of the price to be paid thereon, the contract of sale cannot be deemed to be completed so long as the price remains undetermined.[3] There will, therefore, be no sale if the parties, though apparently agreed, are really mutually mistaken as to the price to be paid.[4] There will also be no sale if the price is left to be afterwards agreed upon, and the parties fail afterwards to agree;[5] though if the sale be for a reasonable price to be afterwards agreed upon, and the parties cannot agree, the law will supply the method.[6]

[1] See *ante*, § 1.

[2] A transfer of property cannot be regarded as a sale thereof when no purchase price has been agreed upon, nor the price in any manner made definite, nor any means agreed upon by which the price can be ascertained. Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. R. 737, 37 Am. St. R. 32.

[3] Foster v. Lumbermen's Mining Co., 68 Mich. 188, 36 N. W. R. 171 [citing Williamson v. Berry, 8 How. (U. S.) 544]; Bigley v. Risher, 63 Pa. St. 152; Devane v. Fennell, 2 Ired. (N. C.) 36.

[4] See *post*, § 278.

[5] Wittkowsky v. Wasson, 71 N. C. 451; Albemarle Lumber Co. v. Wilcox, 105 N. C. 34.

[6] Greene v. Lewis, 85 Ala. 221, 4 S.

§ 206. —— **Executed contracts.**— In the case of executed contracts, however, "the rule is settled that the title to personal property may pass to a vendee without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties."[1] "In the latter class of contracts," *i. e.*, the executed contracts, "where the seller, whether by actual delivery or other like unequivocal act, intentionally passes the property in specific goods to the purchaser without fixing the price, the law leaves the price to be adjusted by the agreement of the parties, or, if they fail to agree, by the verdict of a jury. If such price is left open for future adjustment by consent, the property being delivered with the expressed intention to complete the sale, the price to be agreed on is implied to be one that is fair and reasonable, and this is always the rule of recovery on a *quantum meruit* or *quantum valebat*. If there should or can be no mutual consent, the implication follows as part of the original contract of sale, that a jury will adjust it, just as manifestly as in every-day sales and delivery of goods by merchants on open account, where the price is very often not adjusted for months afterward."[2]

§ 207. **Where price not agreed upon, reasonable worth is the price.**— Where the parties have agreed upon the other elements of the sale, but have made no reference to the price, and therefore have not disagreed upon it or left it open for further negotiation, and where it is agreed that the title shall pass, and the price shall be adjusted afterwards, and no other adjustment is made, the law implies that the goods are to be paid for at what they are reasonably worth.[3]

R. 740, 7 Am. St. R. 42. See also Hassard v. Hardison, 117 N. C. 60, 23 S. E. R. 96.

[1] See *post*, §§ 493–498; Greene v. Lewis, 85 Ala. 221, 4 S. R. 740, 7 Am. St. R. 42; Shealy v. Edwards, 73 Ala. 175, 49 Am. R. 43, 75 Ala. 411; Wilkinson v. Williamson, 76 Ala. 163.

[2] Shealy v. Edwards, 73 Ala. 175, 49 Am. R. 43, citing Benj. Sales, § 87; Valpy v. Gibson, 4 C. B. 837; Macomber v. Parker, 13 Pick. (Mass.) 175; Boswell v. Green, 1 Dutch. (N. J.) 390.

[3] Acebal v. Levy, 10 Bing. 376; Hoadly v. McLaine, 10 Bing. 482; Shealy v. Edwards, 73 Ala. 175, 49 Am. R. 43; Greene v. Lewis, 85 Ala. 221, 7 Am. St. R. 42, 4 S. R. 740; Lovejoy v. Michels, 88 Mich. 15, 49 N. W.

For like reasons, where the parties have fixed the price, but their agreement in that respect is invalid because the price was fixed on Sunday, the law, if the sale is otherwise complete and valid, will imply a promise to pay what the goods are reasonably worth.[1]

So, also, "under an allegation of an agreed price, if there is a failure to prove the agreement as to price, evidence of value is competent for the purpose of a recovery of what the article was fairly worth, but not to sustain a recovery beyond the amount alleged."[2] Where, however, the price is fixed by the contract, that price must govern, and the mere fact that there is conflict in the evidence as to what the price was, will not justify the jury in declining to ascertain that price and awarding the reasonable value in its place.[3]

§ 208. Market price — Market controlled by monopolistic "combination." — This reasonable worth or price is usually

R. 901, 13 L. R. A. 770; James v. Muir, 33 Mich. 223; Comstock v. Sanger, 51 Mich. 497, 16 N. W. R. 872; Livingston v. Wagner, 23 Nev. 53, 42 Pac. R. 290; Snodgrass v. Broadwell, 2 Litt. (Ky.) 353; Jenkins v. Richardson, 6 J. J. Marsh. (Ky.) 442; Tucker v. Cady, 25 Ill. App. 578. The market price at the time of the sale is to govern, unaffected by subsequent changes. Hill v. Hill, 1 N. J. L. 261. And where goods are ordered to be shipped the market value at the time and place of shipment controls. Fenton v. Braden, 2 Cranch, C. C. 550, 8 Fed. Cas., p. 1140.

Where parties have had a contract for a specific quantity of goods at a certain price, and more are ordered, there is no implied understanding that these shall be at the same price, especially where it is known that the market price has advanced. Rice v. Western Fuse Co., 64 Ill. App. 603.

Where A says to B: "When you are ready to sell your corn, deliver it at my warehouse and I will make it satisfactory as to the price," and B delivers it, the law will imply a promise to pay the market price. McEwen v. Morey, 60 Ill. 32. The owner of a chattel requested A to sell it but named no price. A contracted to sell it to B at a certain price. Before B accepted it, he met the owner, who notified B to pay no one but himself, to which B assented but no price was named. *Held*, an assent to the sale, and, as no price was named, the reasonable value could be recovered. Taft v. Travis, 136 Mass. 95.

[1] Bradley v. Rea, 14 Allen (Mass.), 20; s. c., 103 Mass. 188, 4 Am. R. 524.

[2] Livingston v. Wagner, 23 Nev. 53, 42 Pac. R. 290, quoting Abbott's Trial Evidence, 306, and citing Sussdorf v. Schmidt, 55 N. Y. 319; Trimble v. Stillwell, 4 E. D. Smith, 512.

[3] Illinois Linen Co. v. Hough, 91 Ill. 63.

the market or current price, but it is not necessarily so.[1] As is said in a leading case:[2] "The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes." Where, therefore, the present market price is one fixed arbitrarily by a combination of all the manufacturers or dealers in a given article, that price cannot control where one has purchased such goods not knowing of this price and not agreeing to pay it.[3]

[1] Kountz v. Kirkpatrick, 72 Pa. St. 378, 13 Am. R. 687; Smith v. Griffith, 3 Hill (N. Y.), 337, 38 Am. Dec. 639; Blydenburgh v. Welsh, Bald. (U. S. D.) 331.

[2] Acebal v. Levy, *supra*.

[3] Lovejoy v. Michels, 88 Mich. 15, 13 L. R. A. 770, 49 N. W. R. 901.

Champlin, C. J., said: "I do not think a price so fixed by a combination of manufacturers or dealers is competent evidence to show a reasonable price of goods sold by the members of such combination. Such combinations to control prices are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute therefor the stimulus of unconscionable gain, whereby the participants in such combinations become enriched at the expense of the consumer, beyond what he ought legitimately to pay, under a healthy spirit of competition in the business community. The effect of such combinations to control prices is the same as that other class of contracts which has always been denounced as vicious, namely, contracts in restraint of trade. Public policy places its reprobation upon one equally with the other. These combinations to control prices are becoming very numerous, and affect not only the staples of human sustenance, but nearly all the necessaries of life and the necessaries of business. Such combinations to control prices are against public policy, and void, on the ground that they have a mischievous tendency, so as to be injurious to the best interests of the State. The best interests of the State require that all legitimate business should be open to competition; that the current price of commodities should be controlled by the law of demand and supply; that the laws of commerce should flow in their accustomed channels, and should not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties. Of course, what is said above does not apply to monopolies authorized by law; as, for instance, to patented articles. The odious features of illegal monopolies are plainly apparent. These can absolutely control the prices which the public shall pay, and it is this monopolistic feature of such combinations to control prices which stamps them as odious, because they exercise the franchises of the monopoly without the legal right. These views are supported in the following

§ 209. Other methods of fixing price.— There may also be many other methods adopted for fixing the price. The material point is not a particular method, but whether the method chosen will result in fixing the price with requisite certainty.

cases: Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. R. 670; Railroad Co. v. Closser, 126 Ind. 348, 9 L. R. A. 754, 26 N. E. R. 159; People v. Refining Co., 54 Hun (N. Y.), 354, 5 L. R. A. 386; Richardson v. Buhl, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. R. 1102; Carbon Co. v. McMillin, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. R. 530; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. R. 159; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. R. 190; Salt Co. v. Guthrie, 35 Ohio St. 666; Association v. Koch, 14 La. Ann. 168; Denver, etc. R. Co. v. Atchison, etc. R. Co., 15 Fed. R. 650; Hilton v. Eckersley, 6 El. & Bl. 47; West Va. Trans. Co. v. Ohio River Pipe-Line Co., 22 W. Va. 600, 617; W. U. Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. R. 781; Craft v McConoughy, 79 Ill. 346, 22 Am. R. 171; Raymond v. Leavitt, 46 Mich. 447, 41 Am. R. 170, 9 N. W. R. 525; Faulds v. Yates, 57 Ill. 416, 11 Am. R. 24; Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186.

"I have no doubt that in executory contracts of sale, where the goods have not been accepted, such price so fixed cannot be recovered; and I am also of opinion that such price so fixed is no criterion of the market value or current price in an action brought for goods sold and delivered, where no price has been agreed upon. In this case the goods have been ordered and accepted without any reference to the price to be paid, and the law presumes that defendant intended to pay what the knives were reasonably worth. As pointed out in James v. Muir, 33 Mich. 223, the market value and reasonable worth of a commodity are not always the same. Ordinarily the market value is evidence of what goods are reasonably worth. Kountz v. Kirkpatrick, 72 Pa. St. 376, 386, 13 Am. R. 687; Benj. Sales, p. 103, § 86. If there be no market value of manufactured goods, the evidence to establish the reasonable worth must necessarily be the cost of production, which would include the cost of labor and material, and a reasonable profit on the cost of production."

And McGrath, J., said: "A price so fixed is not entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its character. Associations of this character give the buyer no voice, and close the market against competition. In Acebal v. Levy, 10 Bing. 376, cited in Benjamin on Sales, § 86, the court declared that, when there was no express contract as to price, the price is to be a reasonable price,— 'such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such ship-

As is said in one case, "the price to be paid must be certain, or some guide must be agreed on by which it can be found with certainty. There may be a sale for a reasonable price, in which case, if the parties afterwards differ, the price must be made certain by the verdict of a jury. Or there may be a sale at a price to be afterwards fixed by valuers. In such case if the valuers refuse to fix the price, the sale is considered incomplete, or else as rescinded by the refusal. If, indeed, the thing sold has been delivered to the vendee, and consumed, so that

ment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes.' In James v. Muir, 33 Mich. 223–227, Mr. Justice Campbell, speaking for the court, says: "According to Acebal v. Levy, there is at least no implication of a promise to pay at what may happen to be the market rate, which may not be always, as there held, a reasonable rate." In Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. R. 687, the court say: "Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its market value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because 'value' and 'price' are really convertible terms, but only because they are ordinarily so in a fair market. The market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. Without adding more, I think it is conclusively shown that what is called the 'market price' or the quotations of the articles for a given day is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day has been unnaturally inflated."

"It has frequently been held that the value of a commodity is not to be determined by the necessities of a particular buyer or the demands of a particular seller. If the 'current price' is not conclusive upon the purchaser, because the vendor may have by some act of his own made that price unreasonable, or if it may be shown that the market price had been unnaturally inflated, how can it be said that a price fixed by a combination of the manufacturers of a given article, with sole reference to their interests, is to govern, to the exclusion of all other considerations? In such case there is no market price, and evidence of a fair market price or a fair market value is clearly admissible. In the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value."

the parties cannot be put *in statu quo*, the vendee is liable for a reasonable price.[1] But there cannot be an executed sale so as to pass the property, where the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree. One element of a sale is wanting, just as a different element would be if the thing were not ascertained. If, in such case, the thing was actually delivered and consumed, the vendee would be liable, not upon the special imperfect contract, but on an implied contract to pay a reasonable price."[2]

§ 210. Method must fix price with certainty.— It is not, therefore, necessary that the price should be fixed by the contract itself, or at the very time the contract is made, provided that the parties have settled upon some method by which the price may be determined with certainty. "If the parties settle between themselves some method by which it may be ascertained at a future period, the maxim *id certum est quod certum reddi potest* applies, and the price when so settled shall relate to the original contract."[3] Thus where the contract for the sale of a village lot provided that the price should be that at which the first lots in the vicinity should be sold, and lots adjoining the one in question were sold before the action was brought, it was held that the contract was thus rendered certain.[4] So where the contract provided that the price of wheat sold should be ten cents per bushel less than the Milwaukee market price on a day which the vendor should thereafter name, it was held sufficient though the wheat was destroyed before the day was fixed.[5] And a contract for the sale of wheat which provided for payment at the market price on the day when the vendor should demand payment was held suffi-

[1] Citing Benjamin on Sales, 69; Clarke v. Westrope, 18 C. B. 765.

[2] Wittkowsky v. Wasson, 71 N. C. 451.

[3] McBride v. Silverthorne, 11 Up. Can. Q. B. 545 (citing Ross on Vendors, 51); McConnell v. Hughes, 29 Wis. 537; Cunningham v. Brown, 44 Wis. 72.

The price may be made to correspond with the fluctuations in the value of gold. Ames v. Quimby, 96 U. S. 324.

[4] Cunningham v. Brown, *supra*.

[5] McConnell v. Hughes, *supra*. So in Shaw v. Smith, 45 Kan. 334, 25 Pac. R. 886, 11 L. R. A. 681, Mechem's Cas. on Damages, 260, the price of flaxseed was to be "thirty-five cents less than St. Louis market price on day of delivery."

cient.[1] So a contract for the sale of goods at the price for which the manufacturers should sell similar articles at a given time in the following year, affords a specific means by which the price may be ascertained.[2] And so of a contract to sell at the same rate which the seller gives to the buyer's neighbors.[3]

§ 211. —— Dependent on subsequent acts or events.— The amount may also be made to depend upon subsequent events or conditions, being fixed at one price if a certain event happens, and at a different price if that event does not happen.[4] But an executory contract to sell ore at a price to be determined by that which the vendee might subsequently receive upon a resale of it has been held insufficient to pass the title.[5] So an agreement to pay "as much as any one else would pay" has been held too uncertain to sustain an action for specific performance.[6] And an agreement for the sale of ice at a price which would yield the seller a net profit not to exceed one dollar per ton has been held void for uncertainty.[7]

[1] McBride v. Silverthorne, *supra;* Phifer v. Erwin, 100 N. C. 59, 6 S. E. R. 672. To same effect: Daniel v. Hannah (1898), 106 Ga. 91, 31 S. E. R. 734.

A contract to pay the seller of logs "the most that he could get offered in money for them delivered at Jackson, when measured," is sufficient. Hagins v. Combs (1897), 102 Ky. 165, 43 S. W. R. 222. And so is a contract to sell at the "lowest jobbing prices." Beardsley v. Smith, 61 Ill. App. 340.

[2] Lund v. McCutchen, 83 Iowa, 755, 49 N. W. R. 998.

[3] Ashcroft v. Butterworth, 136 Mass. 511.

[4] As in Newell v. Smith, 53 Conn. 72, where the price of a cow was fixed at $100 if she proved then to be with calf, but only $40 otherwise. See also Brogden v. Marriott, 2 Bing. N. C. 473, 29 Eng. Com. 397.

A provision in a contract for the sale of goods to be delivered at different times, that "if, during the deliveries on this contract, *the price* should be below the price herein named, we agree to rebate such difference on deliveries so affected," the words "*the price*" mean the market price. Wing v. Wadhams Oil Co. (1898), 99 Wis. 248, 74 N. W. R. 819.

[5] Foster v. Lumbermen's Mining Co., 68 Mich. 188.

[6] Gelston v. Sigmund, 27 Md. 334. But see Hagins v. Combs, *supra.*

[7] Buckmaster v. Consumers' Ice Co. (1874), 5 Daly (N. Y.), 313.

In Daniel v. Hannah (1898), 106 Ga. 91, 31 S. E. R. 734, a sale of cotton was made, stipulating that the price should be "the highest market price in Thomaston for the cotton on November 10, 1896." *Held*, that "the fact that the price of the cotton was to be ascertained subsequently, by the condition of the market at a particular place does not affect the validity or completeness of the sale."

In Deyo v. Hammond (1894), 102

§ 212. —— Price to be fixed by valuers.— It is also competent for the parties to provide that the price shall be such as may thereafter be fixed by valuers,[1] and in case it is so fixed they are as much bound by it as if they had fixed it themselves.[2] The values may properly, and perhaps under the statute of frauds, in some cases, should, be named in the agreement; but if the valuers are appointed and act, this ordinarily is sufficient.[3]

Mich. 122, 60 N. W. R. 455, plaintiff sold a mare to the defendant under an agreement that if, in a test to be made within ninety days, the mare could trot as fast as one owned by the defendant, an additional price was to be paid. The test was not made, owing to the sickness of one mare and the lameness of the other, both having been in the defendant's possession during the ninety days. *Held*, that the defendant was nevertheless liable to pay the extra price, it being shown from other sources that plaintiff's mare was several seconds faster than defendant's mare.

In Lilienthal v. Suffolk Brewing Co. (1891), 154 Mass. 185, 28 N. E. R. 151, a sale of hops was made for a certain price, with the condition that if the purchaser subsequently found it was not the market price the sale should be void. *Held*, that there was a present sale upon condition subsequent.

[1] That such an appraisement is not an arbitration, and that the parties are not entitled to notice of hearing, and that the appraisal, unless fraudulent, is conclusive, see Norton v. Gale, 95 Ill. 533, 35 Am. R. 173, citing many cases. See also Stose v. Heissler, 120 Ill. 433, 11 N. E. R. 161, 60 Am. R. 563. In New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. R. 432, the court say: "It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested, provided the interest was known, and no objection was made by the parties, and no fraud or bad faith is shown. Brown v. Bellows, 4 Pick. 179, 189; Palmer v. Clark, 106 Mass. 373, 389; Haley v. Bellamy, 137 Mass. 357, 359; Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 560, 569; Benjamin on Sales, § 88, note 3."

[2] Wilcox v. Young, 66 Mich. 687.

[3] In Brown v. Bellows, 4 Pick. (Mass.) 179, it is said: "The first objection is that the writing declared upon is void by the statute of frauds, inasmuch as it purports to be a contract concerning the sale of real estate, and is to be partly made out by parol evidence, for that the referees are not named in the instrument, but it depends wholly upon parol evidence to prove who were chosen to be the referees. What weight might originally have attached to this suggestion it is not necessary to decide, because the contract has been performed in this respect. The parties were satisfied with the appraisers, and attended upon them during their appraisal. It is too late for either now to object that it cannot be legally known who were chosen for that purpose. The parties could not have conducted themselves as they did, in this respect, unless on account of the agreement, and so far in performance of the same."

§ 213. ——. But in order that the contract shall take effect it is essential that the price shall be fixed as provided in the agreement; for if the parties fail to appoint valuers, or the latter fail or refuse to act, the contract, if executory, must fail, and unless the contrary intention appears the title will not pass,[1] even though the failure in the valuation should be caused by one of the parties.[2] Where, however, the goods have been delivered, and the vendee has prevented the valuation by consuming or disposing of the goods before the valuation has taken place, he will be liable for their reasonable worth.[3]

§ 214. **Payment of the price.**— The question of the payment of the price; when it is due; where, how and to whom it is to be paid; in what medium, and the like; and the question of payment in specific articles, are matters reserved for treatment in a later chapter upon the general subject of "Payment."[4]

[1] In Fuller v. Bean, 30 N. H. 290, the question was whether certain goods had been sold, so that the title passed, in an interview between Fuller and one Felton at Concord. When the parties separated at Concord the price had not been fixed, but they agreed that it should be fixed by one Neal, who did fix it the next day. Said the court: "The bargain was that Neal should appraise the goods, and that Fuller should pay for them at the rate of seventy-five per cent. of the appraisal, one half by his own note and the other half by J. G. Fuller's note and cash. Now a price is essential to a contract of sale. *Nulla emptio sine pretio esse potest;* though if the price can be made certain it is sufficient. Just. Inst. 3, 23; 4 Kent's Com. 468, 477; Poth. de Vente, p. 1, sec. 1, p. 3. When the parties then separated and Fulton returned to Boston the sale was incomplete. It was at that time contingent whether Neal would make an appraisal, without which there would be no sale. *Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire tunc pro nihilo esse venditionem.* Inst. 3, 23; Poth. de Vente, pt. 1, art. 2, sec. 2. That appraisal remained to be made. It was an act to be done before the property could pass to Fuller, unless it could be fairly inferred from the evidence relative to the agreement that it was the understanding of the parties that the property should nevertheless pass at once."

[2] Thurnell v. Balbirnie, 2 Mees. & W. 786; Vickers v. Vickers, L. R. 4 Eq. 529; Milnes v. Gery, 14 Ves. 400.

[3] Clarke v. Westrope, 18 Com. B. 765, 86 Eng. Com. L. 764; Humaston v. Telegraph Co., 20 Wall. (U. S.) 20 [citing Inchbald v. Western Plantation Co., 17 Com. B. (N. S.) 733; Hall v. Conder, 2 id. 53; United States v. Wilkins, 6 Wheat. (U. S.) 135; Kenniston v. Ham, 9 Fost. (N. H.) 506; Holliday v. Marshall, 7 Johns. (N. Y.) 211; Cowper v. Andrews, Hobart, 40, 43]; Albemarle Lumber Co. v. Wilcox, 105 N. C. 34.

[4] See *post,* § 1404 *et seq.*

CHAPTER VI.

OF THE CONTRACT OF SALE — IN GENERAL.

§ 215. Purpose of this chapter.
216. Of the contract in general.

I. Of Mutual Assent.

217. Necessity of mutual assent.
218. Assent need not be express.
219. Assent must be mutual, unconditional and co-existent.
220–223. Mere negotiations not amounting to proposition and acceptance.
224, 225. Mere announcements or price lists not offers.
226. Offer must be accepted.
227, 228. Offer must be accepted as made.
229. Counter-proposition operates as a rejection.
230, 231. —— What constitutes such counter-proposition.
232. —— If counter-proposition accepted, contract results.
233. —— Original proposition not open to acceptance after rejection by counter-proposition.
234. Terms of sale must be fully agreed upon.
235–237. Negotiations in contemplation of more formal contract.
238. Acceptance must be communicated.
239. Manner of accepting.
240. —— What constitutes.
241–243. —— Acceptance by conduct.
244, 245. Time of acceptance.
§ 246. Question of acceptance, how determined.
247. Communication by mail, telegraph, etc.
248–250. —— Method of acceptance in these cases.
251. —— Time of acceptance in these cases.
252. Right to withdraw offer.
253. —— Voluntary offer may be withdrawn, though time given for its acceptance.
254. —— Voluntary offer may be revoked, though declared "irrevocable."
255. —— Unaccepted offer not such a contract as excludes parol evidence.
256. —— Agreement for consideration not to withdraw offer.
257. —— How offer revoked.
258. —— Mailing letter, etc., not enough.
259. —— Offer under seal.
260. —— Lapse of offer — Notice.
261. —— Waiver of revocation.
262. Withdrawal of acceptance.

II. Unilateral Contracts.

263, 264. Unilateral contracts.

III. Of the Effect of Mistake in Making the Contract.

265. Mistakes of parties in making the contract.
266. Mistake as to nature of transaction.
267–269. Mistake as to identity of party.

§ 270. Mistake regarding the thing sold.
271. —— Existence of thing sold.
272. —— Identity of thing sold.
273. —— Unknown articles contained or concealed in thing sold.
274. —— Mistake as to quantity.
§ 275, 276. —— Mistake as to kind, quality or character.
277. —— Mistake as to location.
278. Mistake as to terms of contract — Price.
279. Mistake as to possibility of performance.

§ 215. **Purpose of this chapter.**— Sale being a transfer of the title to goods in pursuance of a valid agreement to that effect, it is obvious that a question which demands early attention is, What bargainings between parties will suffice to indicate their assent to a transfer of the title?

Ordinarily this must be a question depending upon the general principles of contract, and it might be safe and proper, perhaps, to leave the consideration of this aspect of contracts to the writers upon that general subject. A review, however, of the leading principles applicable to this particular phase of that greater subject may not be thought to be inappropriate, and will be attempted here.

So much of the subject as is unaffected by the statute of frauds will be dealt with in this chapter, and the application of that statute will be the subject-matter of the following chapter.

§ 216. **Of the contract in general.**— Except as it is affected by the statute of frauds, there is nothing in the rules governing the formation of the contract of sale which requires that that contract shall be made in any particular manner or in any particular form. Competent parties are required — and the question of their competency has already been considered; and there is required the assent of the parties that the title to a specific chattel shall pass from one party and vest in the other. This matter of assent or agreement, therefore, seems to be the one which logically falls next in order for consideration; and the formal rule may be stated, as an introduction to the general subject, thus —

I.

Of Mutual Assent.

§ 217. The necessity of mutual assent.— To the making of the perfect contract of sale, as to the making of every other contract, it is indispensable that there should be the mutual assent of the parties to the subject-matter of the contract. And in this, as in other cases, it is essential that the minds of the parties shall meet,— that they shall both assent to the same thing and in the same sense.

Hence until there is a clearly-defined offer on the one side to sell, and a definite acceptance of that offer on the other, there can be no sale, and the title will not pass even though the property be delivered.[1]

But, to quote the language of Mr. Benjamin:[2]—

§ 218. The assent need not be express.— "The assent of the parties to a sale need not be express. It may be implied from their language[3] or from their conduct;[4] may be signified by a nod or a gesture,[5] or may be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods."[6]

§ 219. Assent must be mutual, unconditional and co-existent.— "But," continues Mr. Benjamin, "the assent must, in order to constitute a valid contract, be *mutual and intended to*

[1] Utley v. Donaldson, 94 U. S. 29, 47; Gardner v. Lane, 12 Allen (Mass.), 39; Summers v. Mills, 21 Tex. 77.

[2] Benjamin on Sale, § 38.

[3] Citing Joyce v. Swann, 17 C. B. (N. S.) 84, "a curious case of what one of the judges termed a 'grumbling' assent."

[4] Citing Brogden v. Metropolitan Ry. Co., 2 App. Cas. 666, "where the parties had *acted upon* the terms of a draft of a proposed agreement, which was intended to form the basis of a formal contract, to be afterwards executed by them both."

[5] The fall of the hammer at an auction sale, the nod of the bidder, and the like, are familiar instances of this.

[6] Citing Black. Com., Bk. II, ch. 30, p. 443; Hoadley v. McLaine, 10 Bing. 482, per Tindal, C. J.

bind both sides. It must also *co-exist at the same moment of time.* A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional.* If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer."

§ 220. Mere negotiations not amounting to proposition and acceptance.—Mere negotiations which do not ripen into an offer, on one side, and an acceptance of that offer as made, on the other side, do not amount to a contract of sale. This is very clearly put, in a leading case,[1] by Sergeant, J., as follows: "It is incumbent on a party suing to recover damages for breach of contract to make out a clear case of some matter or thing mutually assented to and agreed upon by the parties to the alleged contract. When the agreement is in writing, signed and executed by the parties, their assent to all that is contained in it is no longer a matter of dispute; the questions which arise in such a case are of a different character. But when it is epistolary, consisting of a series of letters containing inquiries, propositions and answers, it is necessary that some point should be attained at which the distinct proposition of the one party is unqualifiedly acceded to by the other, so that nothing further is wanting on either side to manifest that *aggregatio mentium* which constitutes an agreement, and that junction of wills in the same identical matter, offered on one side and concurred in by the other, bringing everything to a conclusion, which in contemplation of law amounts to a contract. If a proposition be made by one man to another to

[1] Slaymaker v. Irwin, 4 Whart. (Pa.) 369.

purchase an article from him at a certain price and on certain terms, which is accepted as offered, there is then an agreement or contract. But if, instead of accepting it, the party declines so doing, and then new terms of purchase are offered, the assent is yet to be given by the other to the terms thus varied. It is not a contract — it is the suggestion or proposal of a new subject of contract, on which the first party has again a right to pause, to consider, to accept, to reject, to suggest new terms; and all is in the meantime merely negotiation."

§ 221. ——. In a case[1] often cited it appeared that A wrote to B as follows: "Say how many white, colored and woolen rags you have on hand, and your prices for them." B replied: "I have about a ton each, white and colored rags, and my prices are three and one-half cents for colored and seven cents for white." A replied: "I will take the rags at the price you name." B made no written reply, but there was evidence tending to show a subsequent oral agreement by him to deliver the rags, which he afterwards refused to do. Said Metcalf, J.: "The evidence introduced by the plaintiffs at the trial failed to prove that the defendants made the contract with them for the breach of which their action was brought. That evidence consisted of three letters. The first was from the plaintiffs to the defendants, merely inquiring what were the quantity and price of rags which they had on hand. The second was the defendants' reply to the first, merely stating the quantity of rags which they had, and the price thereof. Thus far there was no offer of one party to buy, nor of the other party to sell. The third letter was from the plaintiffs, saying to the defendants that they would take the rags at the price which the defendants had named. This was the first offer in the case, and this offer the defendants never accepted in writing. And an oral acceptance, if they had made it, would not have bound them; the case being within the statute of frauds, no part of the rags having been accepted and received by the plaintiffs, and nothing having been given by them in earnest

[1] Smith v. Gowdy, 8 Allen (Mass.), 566.

to bind the bargain, or in part payment. It is clear, therefore, that no contract was completed, there having been no assent to a sale by the union of both parties' minds."

§ 222. ——. So, in a recent case,[1] it appeared that the plaintiff, Ahearn, asked one member of defendants' firm how much they were paying for stave-bolts, and was told that defendants would take all he could make and deliver at $2 per cord. Plaintiff made a lot of bolts, which he proposed to furnish to defendants, but they denied any bargain. Ahearn sued them for not accepting the bolts. Said the court: "There was no contract made out. Ahearn did not inform defendants that he would accept or act on their order, or deliver any bolts, or, if any, how many. The transaction went no further than what occurs when any one asks another what he will either give or take for commodities. Such inquiries may lead to bargains, but do not make them."

§ 223. ——. So, again,[2] plaintiff inquired of defendant the price of certain steers belonging to the latter. Defendant wrote in reply: "I could not give you a close price on the steers, on account of not seeing them for a while, but they ought to be worth $4.25. . . . Go see them." Plaintiff went to see them, and wrote that he would take them at the price named, but defendant sold them elsewhere. In an action by plaintiff for breach of an alleged contract of sale, it was held that defendant's letter did not constitute an offer, and that there was therefore no contract between the parties.

§ 224. **Mere announcement to traders or price-list is not an offer to sell such goods as may be ordered.**— So a mere advertisement or announcement of goods for sale, or a price-list or circular calling the attention of prospective purchasers to goods or prices, or a mere offer to sell goods generally, does not constitute an offer to sell such goods as may be ordered at

[1] Ahearn v. Ayres, 38 Mich. 692.

[2] Patton v. Arney (1895), 95 Iowa, 664, 64 N. W. R. 635.

the prices named.[1] Thus, in a leading case,[2] it appeared that the defendants wrote to the plaintiff saying: "We are authorized to offer Michigan fine salt in full car-load lots of eighty to ninety-five bbls., delivered in your city at eighty-five cents

[1] Moulton v. Kershaw, 59 Wis. 316, 18 N. W. R. 172, 48 Am. R. 516; Beaupré v. Telegraph Co., 21 Minn. 155; Kinghorne v. Telegraph Co., 18 U. C. Q. B. 60; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45, 4 N. E. R. 4.

[2] Moulton v. Kershaw, *supra*, distinguishing Keller v. Ybarru, 3 Cal. 147.

In Beaupré v. Telegraph Co., 21 Minn. 155, *supra*, it appeared that the plaintiffs, merchants in St. Paul, wrote to R., a wholesale dealer in pork at Dubuque, "Have you any more Northwestern mess pork, or prime mess? Also extra mess; telegraph price on receipt of this." R. telegraphed in reply: "Letter received. No light mess here. Extra mess twenty-eight seventy-five ($28.75)." On July 15, the plaintiffs, having received R.'s dispatch, delivered to the defendant at St. Paul, at about 6 o'clock P. M., the following message addressed to R., with a request to forward it without delay: "Dispatch received. Will take two hundred extra mess, price named." *Held*, that the letter and telegrams did not constitute a contract. The court said: "The plaintiffs, in their complaint, treat Ryan's dispatch as an offer to sell such quantity of pork as they might order, at the price therein named, and their own message as an acceptance of such offer, and an agreement on their part to take two hundred barrels at that price. If such were the character of these dispatches, then the plaintiffs' message, if seasonably delivered, would have effected a valid executory contract of sale, by which Ryan would be bound to furnish the pork contracted for, at the contract price. . . . But neither Ryan's dispatch nor the plaintiffs' message will bear the construction put upon it in the complaint. The plaintiffs had written to Ryan, inquiring if he had any more pork of certain kinds, and requesting him to "telegraph price on receipt of this." Ryan accordingly telegraphed as follows: "Letter received. No light mess here. Extra mess twenty-eight seventy-five ($28.75)." Upon receipt of this dispatch, the plaintiffs sent this message, which the defendant neglected to deliver in due season: "Dispatch received. Will take two hundred extra mess, price named." Ryan's dispatch did not purport to be an offer to sell any quantity of pork whatever, nor was the plaintiffs' message an acceptance of any offer. The seasonable delivery of plaintiffs' message to Ryan would not have effected any contract binding him to deliver to the plaintiffs two hundred barrels, at the price named. Ryan's dispatch was rather (as seems to be admitted by the plaintiffs in their printed argument) a quotation of the market price of pork, or perhaps a statement of the price at which he held his own pork; and the plaintiffs' message was an offer to take two hundred barrels at the price named—a mere order for goods, which Ryan might accept or reject at his pleas-

per bbl." The plaintiff telegraphed: "Your letter of yesterday received and noted. You may ship me 2,000 bbls. of Michigan fine salt as offered in your letter." The court held that the letter did not constitute an offer of sale. Said the court: "We place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word 'sell' is not used. They say, 'We are authorized to offer Michigan fine salt,' etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say we offer to sell to you. They use the general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties."

§ 225. ——. So in a recent case in Massachusetts[1] it is said: "A contract is an agreement which creates an obligation. If a person writes to a merchant, 'At what price will you fill my

ure, and until his acceptance no contract would exist between the parties."

But this rule as to quotations was held not to apply where one party wrote to the other, "Please advise us the lowest price you can make us on our order for ten car-loads of Mason green jars," and the other replied, "We quote you Mason fruit jars" at certain prices "for immediate acceptance;" to which the first replied by telegraph, "Enter order ten car-loads as per your quotation." This was held to constitute a complete contract from which the seller could not withdraw by telegraphing, "Impossible to book your order. Output all sold." Fairmount Glass Works v. Grunden-Martin Woodenware Co. (1899), — Ky. —, 51 S. W. R. 196.

[1] Ashcroft v. Butterworth, 136 Mass. 511. See also Lincoln v. Erie Preserving Co., 132 Mass. 129.

orders for goods?' and receives in writing the answer, 'I will sell you at the same rate I sell your neighbors,' is the merchant bound to fill any order or any reasonable order he may receive before the offer is revoked? The offer is not certain, or capable of being made certain, in regard to the quantity or particular quality, size and kind of goods which the merchant agrees to sell. It is not intended to bind him absolutely to sell his whole stock or any specific part of it which the customer may order. It does not contain the means of identifying the property he offers to sell. It expresses a general willingness to sell this customer, out of his stock, at the same price at which he sells another, and leaves the merchant the right to accept or reject any particular order."

§ 226. **Offer must be accepted — Mere unaccepted offer not enough.**— So clearly a mere offer on the one side, not accepted on the other, is not sufficient. Thus, B., C. & Co., the defendants in an action,[1] wrote: "We agree to sell M. one million feet of Norway (pine); . . . said Norway to be suitable for making square timber, and will make a contract with him giving him the right to go on said lands and cut and remove said timber on payment for the same. The price of said Norway to be," etc. Said the court: "This instrument was not a contract. It was simply an offer to make one, with a statement of the terms. There was no mutuality It was the act alone of the defendants, and it was not supported by any duty or obligation of the plaintiff, or of any other person, or by any form of consideration whatever, and there was no averment of acceptance by the plaintiff. There is no appearance of a cause of action."[2]

§ 227. **Offer must be accepted as made.**— And not only must the offer be accepted, but it must be accepted as made. Thus, in a case frequently cited,[3] it appeared that the defendant

[1] McDonald v. Bewick, 51 Mich. 79, 16 N. W. R. 240.

[2] Citing Governor, etc. v. Petch, 28 Eng. L. & Eq. 470; Lees v. Whitcomb, 5 Bing. 34; Sykes v. Dixon, 9 Ad. & El. 693; James v. Williams, 5 B. & Ad. 1109; Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Quick v. Wheeler, 78 N. Y. 300.

[3] Hutchison v. Bowker, 5 M. & W.

had written an offer to sell *good* barley. The plaintiff replied, accepting the offer, but adding, "expecting you will give us *fine barley* and *good* weight." To this defendant replied, "You say you expect we shall give you 'fine barley.' Upon reference to our offer, you will find no such expression. As such, we must decline shipping the same." Good barley and fine barley were shown to be distinct grades, and the latter was the heavier. It was therefore held that there had been no acceptance of the offer and hence no contract.

So where defendant offered to buy a horse if warranted "sound and quiet in harness," and the plaintiff sent the horse with a warranty that it was "sound and quiet in double harness," it was held that there was no contract.[1] Many other cases will be found in the notes.

535. See the very similar case of Myers v. Trescott, 59 Hun (N. Y.), 395, to the same effect.

[1] Jordan v. Norton, 4 M. & W. 155. S. wrote to J. offering to sell two hundred boxes of cheese, at a given price, and to deliver them at a place designated, "one hundred now and one hundred about the middle of October next." J. wrote, accepting the offer as to amount, price and place of delivery, but specifying other times of delivery. *Held*, that the two letters did not constitute a contract. Johnson v. Stephenson, 26 Mich. 63.

A offered to sell to B two thousand to five thousand tons of iron rails at terms specified. B wrote back directing the entry of an order for one thousand two hundred tons "as per your favor." A declined to fill this order. *Held*, that B's order was only a qualified acceptance, and hence equivalent to a rejection. Minneapolis, etc. Ry. Co. v. Columbus Rolling Mills, 119 U. S. 149.

An acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and the payment of the money than the residence of the parties or the place named in the offer, is not such an unconditional acceptance as will bind the seller. Northwestern Iron Co. v. Meade, 21 Wis. 480, 94 Am. Dec. 557; Baker v. Holt, 56 Wis. 100, 14 N. W. R. 8. In the latter case, A in Connecticut wrote to B in Wisconsin offering to sell land on certain terms, nothing being said about place of payment or delivery of deed. B wrote saying that he would take the land on the terms stated, the deed to be forwarded to a certain other place in Wisconsin for delivery and payment. B also telegraphed A that he had written that he would take the land at A's figures. Before either the letter or the telegram reached A, but after they had both been sent, A wrote withdrawing his offer. The acceptance by the telegram was held to be limited by conditions fixed in the letter of acceptance, and as the letter of acceptance

§ 228. ——. The rule of these cases was well illustrated and stated by Graves, J.,[1] as follows: "If in answer to a proposal to grant Black Acre, a person replies that he is ready to close the matter and will take White Acre, there is no acceptance.

was not an unconditional acceptance of the offer, it was held there was no sale.

The same rule was also enforced in Weaver v. Burr, 31 W. Va. 736, 3 L. R. A. 94, 8 S. E. R. 743.

A wrote B asking, "What will you sell me 450 kegs of nails for, delivered at Bangor, in the course of a month, cash down?" B replied, "We will sell 450 casks common assorted nails, delivered on the dock at Bangor, at $3.62 per keg of 100 lbs. each, cash." A replied, "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as possible 303 kegs (naming the kinds), and I will send you a check on Exchange Bank, Boston." *Held*, no contract. Jenness v. Iron Co. (1864), 53 Me. 20.

A offered to sell goods to B with a credit of six months after December 15. B offered to pay them on a credit of six months after December 31. A said he could not do that; B said he could do better. *Held*, no sale, though A afterwards sent the goods which were not accepted. Gowing v. Knowles, 118 Mass. 232.

A ordered article x sent to him by B, saying also, "if you please send me" article y "at the same time." *Held*, that B might send both articles x and y or x alone, but not y alone. Virtue v. Beacham, 17 N. Y. Suppl. 450.

A made offer for "15 to 20 bales *good*, new hops at 20 cents, cash." B accepted for "15 bales new hops, for delivery when picked." *Held*, no contract. Carter v. Bingham, 32 Up. Can. Q. B. 615.

In Griffin v. Gratwick Lumber Co. (1893), 97 Mich. 557, 56 N. W. R. 1034, it appeared that the plaintiff offered to sell to the defendant a quantity of logs. Defendant's agent promised to go the next day and examine it, but did not do so. Soon after part of the logs were destroyed by fire. Later another agent of the defendant wrote to plaintiff saying defendant would take the logs at the price named, and would send a man to scale them, but calling attention to the fact that fires had been raging in the vicinity and might have damaged the logs. In an action for the price of the logs as at the date of the offer, it was held that there was no contract. The promise to go and examine the logs was not an acceptance of the offer to sell, and the later letter of acceptance was clearly qualified by the condition that if the logs had been partly destroyed (which was the fact) the defendant did not accept the offer as to them.

Immaterial variation.— But the variation which shall amount to a rejection must be really a variation. Thus, where there was an offer for the sale of a large quantity of lard to be delivered in daily instalments averaging ten thousand pounds each, and the offer declared the "terms of sale cash," the court, though not deciding the point, questioned whether an acceptance declaring, "I shall pay

[1] Eggleston v. Wagner, 46 Mich. 610, 620, 10 N. W. R. 37.

Neither is there an acceptance where executory proceedings on each side are involved in the proposal, and the party professing to accept introduces a variance, and formulates his adoption of the offer with conditions and qualifications which essentially alter some of the constituents or materially vary the effect. In such cases no contract is brought into existence.[1]

bills daily." was really materially different. The court, moreover, held that the two instruments — the offer and the acceptance — must be read together as constituting the agreement, and that when so read, the latter expression explained the former and left no inconsistency. Anglo-American Prov. Co. v. Prentiss (1895), 157 Ill. 506, 42 N. E. R. 157.

[1] Citing Kyle v. Kavanagh, 103 Mass. 356. 4 Am. R. 560; Suydam v. Clark, 2 Sandf. (N. Y.) 133; National Bank v. Hall, 101 U. S. 43; Jordan v. Norton, 4 M. & W. 155; Hussey v. Horne-Payne, 8 Ch. Div. 670, 25 Eng. R. 561; Tilley v. Cook County, 103 U. S. 155.

In Potts v. Whitehead, 23 N. J. Eq. 514, it is said: "An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand;" citing Huddleston v. Briscoe, 11 Ves. (Eng.) 583; Carr v. Duval, 14 Pet. (U. S.) 77; McKibbin v. Brown, 1 McCarter (N. J.), 13; s. c., 2 id. 498; Honeyman v. Marryatt, 6 H. L. C. 112: Routledge v. Grant, 4 Bing. 653; Kennedy v. Lee, 3 Meriv. 441; Hutchison v. Bowker, 5 M. & W. 535; Eliason v. Henshaw, 4 Wheat. (U. S.) 225.

In the case of Fulton Bros. v. Upper Canada Furniture Co., 9 Ontario Appeal Reports, 1883–1884, p. 211, it appeared that, the plaintiffs having agreed to supply the defendant with one hundred thousand feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered: "We do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiff to submit to such inspection. It was held that there had not been shown "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties.

Spragge, O. C. J., said: "The rule as to making out a contract from correspondence has been stayed by many of the judges in England, and by the text-writers on the Law of Contracts, including Mr. Benjamin's able treatise on the Sale of Personal Property. Osler, J., in his judgment in the court below, adopts the language of Mr. Pollock (on Contracts, 3d ed. 37): 'In order to convert a proposal into a promise the acceptance must be absolute and unqualified. For unless and until there is such an acceptance on the one part, of terms proposed on the other part, there is no expression of one and the

"In order to convert a proposal into a promise, the constituents of the acceptance tendered must comply with and conform to the conditions and exigencies of the proposal. The acceptance must be of that which is proposed and nothing else, and must be absolute and unconditional. Whatever the proposal requires to fulfill and effectuate acceptance must be accomplished, and the acceptance must include and carry with it whatever undertaking, right or interest the proposal calls for, and there must be an entire agreement between the proposal and acceptance in regard to the subject-matter and extent of the interest to be contracted."

same common intention of the parties, but at the most expressions of the more or less different intentions of each party separately; in other words, proposals and counter-proposals.' There must be, to use the language of Sir J. Knight Bruce, in Thomas v. Blackman, 1 Coll. 312, 'a clear accession on both sides to one and the same set of terms.' In The Oriental Inland Steam Co. v. Briggs, 4 D., F. & J. 191, Lord Campbell spoke emphatically of its being extremely desirable 'to adhere strictly to the rule of the court that whoever brings forward a contract, as constituted of a proposal on one side and an acceptance on the other, should show that the acceptance is prompt, immediately given, unqualified, simple and unconditional.'

"We find the same language in other cases. The language employed by the parties to correspondence varies as much, perhaps, as the language used by testators in their wills; so that, as was observed by the late learned chief justice of this court, in Bruce v. Tolton, 4 App. R. 144: 'Whether there had been an agreement, the result of mutual assent, must obviously depend in each particular case upon the language employed; and a decision upon one set of correspondence may be of little assistance where the effect of another set comes in question.'" See also Mayer v. McCreery, 119 N. Y. 434, 23 N. E. R. 1045; Corcoran v. White, 117 Ill. 118, 7 N. E. R. 525, 57 Am. R. 858; Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. R. 876, 56 Am. R. 371; Carter v. Bingham, 32 U. Can. (Q. B.) 615; Cangas v. Rumsey Mfg. Co., 37 Mo. App. 297; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. R. 462; Wilkin Mfg. Co. v. Loud Lumber Co. (1892), 94 Mich. 158, 53 N. W. R. 1045 (citing Johnson v. Stephenson, 26 Mich. 63; Wardell v. Williams, 62 Mich. 50, 28 N. W. R. 796; Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. R. 898; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. R. 155); Ames v. Smith, 65 Minn. 304, 67 N. W. R. 999; Wemple v. North Dak. Elev. Co. (1896), 67 Minn. 87, 69 N. W. R. 478; Harris v. Amoskeag Lumber Co. (1895), 97 Ga. 465, 25 S. E. R. 519; Phenix Ins. Co. v. Schultz (1897), 42 U. S. App. 483, 80 Fed. R. 337, 25 C. C. A. 453; McCormick Harv. Mach. Co. v. Richardson (1893), 89 Iowa, 525, 56 N. W. R. 682.

§ 229. Counter-proposition operates as rejection of offer. If, instead of accepting the offer as made, the person addressed responds with a counter-proposition, or an offer to accept if the original offer be modified or altered, he will thereby be deemed to have rejected the first offer.[1] After such a rejection, it is not competent for the party addressed to accept the original offer unless it is again renewed.[2]

This rule is very carefully stated by Mr. Justice Gray of the United States Supreme Court[3] as follows: "As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."[4]

§ 230. —— What constitutes such counter-proposition.— But in order to operate as a rejection the alleged counter-proposition must actually amount to such. A mere inquiry of the proposer whether he will alter his proposal is not, therefore,

[1] Minneapolis, etc. Ry. Co. v. Columbus Rolling Mill, 119 U. S. 149; Hyde v. Wrench, 3 Beav. 334; Solomon v. Webster, 4 Col. 353; Baker v. Holt, 56 Wis. 100, 14 N. W. R. 8; Jenness v. Iron Co., 53 Me. 23; Beckwith v. Cheever, 21 N. H. 41; Weaver v. Burr, 31 W. Va. 736, 8 S. E. R. 743, 3 L. R. A. 94. In the last case it is said: "If to the acceptance a condition be affixed, or any modification or change in the offer be requested by the party to whom the offer is made, this, in law, constitutes a rejection of the offer."

[2] See *post*, § 233.

[3] In Minneapolis, etc. Ry. Co. v. Columbus Rolling Mill, 119 U. S. 149.

[4] Citing Eliason v. Henshaw, 4 Wheat. (U. S.) 225; Carr v. Duval, 14 Pet. (U. S.) 77; National Bank v. Hall, 101 U. S. 43; Hyde v. Wrench, 3 Beav. (Eng.) 334; Fox v. Turner, 1 Ill. App. 153.

such a counter-proposition as will justify the proposer in treating his proposal as rejected, and a subsequent acceptance of the original offer before it has been withdrawn will bind the proposer.

Thus, in a leading English case,[1] defendant wrote, offering to sell iron for 40*s.* per ton, net cash. The offer to remain "open till Monday," the meaning of which expression was admitted to be that the offer was open during all of Monday. On Monday morning plaintiffs telegraphed to defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." Defendant did not answer this message, but in an hour or two sold the iron to a third person at 40*s.* and then advised plaintiffs of the sale by telegram. Before the last message arrived plaintiffs had telegraphed to defendant an acceptance of his offer, and this was held to be a sufficient acceptance. Said the court: "The form of the telegram is one of inquiry. It is not 'I offer forty for delivery over two months,' which would have likened the case to *Hyde v. Wrench*,[2] where one party offered his estate for £1,000 and the other answered by offering £950. Lord Langdale, in that case, held that after the £950 had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter-proposal. Here there is no counter-proposal. The words are, 'Please wire whether you would accept forty for delivery over two months, or if not, the longest limit you will give.' There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer."

§ 231. ——. So where there has been an absolute and unconditional acceptance, the mere expression of a hope by the party accepting that the other will do more than he has agreed will not defeat the acceptance;[3] nor, where a party has by one letter distinctly accepted an offer to sell goods, will the mere

[1] Stevenson v. McLean, 5 Q. B. Div. 346.

[2] 3 Beav. 334.

[3] Phillips v. Moor, 71 Me. 78.

fact that by a subsequent letter he orders more affect the acceptance.[1]

§ 232. —— **If counter-proposal is accepted a contract exists.**— So though a counter-proposal, or an offer of conditional acceptance, is to be regarded as a rejection of the original proposal, it is, of course, competent for the party making the first proposal to accept the counter-proposition and thus effect a contract. In this respect the counter-proposition stands upon the same footing as an original proposition, and if accepted a contract will ensue.[2]

This acceptance, moreover, need not ordinarily be in writing; it may be made orally or be inferred from the conduct of the other party.[3]

§ 233. —— **Original proposal not open to acceptance after its rejection by counter-proposition.**— A further effect of the rejection of the original proposal by the making of a counter-proposition is, as has been already seen,[4] that the original proposal, being rejected, is not afterwards open to acceptance unless its proposer in form or substance renews it. Speaking of this effect of the rejection it was said in one case:[5] "The original offer thereby loses its vitality, being, so to speak, passed by in the course of the negotiation, so as to be no longer pending between the parties, and it becomes an open proposition again only when renewed by the party who first made it. Hence, a party who has submitted a counter-proposition cannot, without the assent of the other party, withdraw or aban-

[1] Gartner v. Hand, 86 Ga. 558, 12 S. E. R. 878.

[2] In Borland v. Guffey, 1 Grant's Cas. (Pa.) 394, A made a proposition to B; B declined to accept it, but made a different one to A by messenger. A was satisfied with this last proposition of B's, but did not notify B of his assent. *Held*, that B was not bound.

[3] Anglo-American Prov. Co. v. Prentiss (1893), 157 Ill. 506, 42 N. E. R. 157.

[4] See two preceding sections.

[5] Fox v. Turner (1878), 1 Ill. App. 153, citing 1 Pars. on Contr. 477; Baker v. Johnson, 37 Iowa, 186; Eliason v. Henshaw, 4 Wheat. 225; Carr v. Duval, 14 Peters, 77; Jenness v. Mt. Hope Iron Co., 53 Me. 20; Belfast, etc. Ry. Co. v. Unity, 62 Me. 148; Sheffield Canal Co. v. Railway Co., 3 Rail. & Can. Cas. 121; Tinn v. Hoffman, 29 Law Times R. (N. S.) 273.

don the same and then accept the original offer which he has once virtually rejected."

§ 234. Terms of sale must be fully agreed upon.— There can obviously be no sale until the terms upon which it is to be made have been fully determined and mutually agreed upon. Mere negotiation is not enough: the negotiation must have ripened into a completed agreement.[1] And the agreement, to

[1] See Utley v. Donaldson, 94 U. S. 29; Oakman v. Rogers, 120 Mass. 214; Gowing v. Knowles, 118 Mass. 232.

In Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. R. 898, the parties had been negotiating for the sale of a boat. Whiteford wrote Hitchcock that he would sell the boat for a given price, but that the price must be paid or secured before shipment. Hitchcock wrote back submitting a different offer, payment to be secured on delivery of boat in Muskegon, and asked a reply by telegraph. Whiteford telegraphed that he would ship the boat and would also come himself. Said the court: "It will be noticed that in his telegram the plaintiff does not accept their offer in so many words. He wires them that he will send boat that week, and he will be in Muskegon first of the next week. Suppose that he had shipped the boat to Muskegon, and had required, after he got there, the money for his boat, or security, before he delivered it, or that the security offered by them had not been satisfactory to him, could the defendants, upon this correspondence, have maintained an action against him for breach of contract if he had refused to deliver it because they would not pay or secure the pay for it before delivery, or because the security offered by them did not suit him? We think not. The minds of the parties had not met upon the terms of payment, and the contract was not completed in this respect."

In Gates v. Nelles, 62 Mich. 444, 29 N. W. R. 73, complainant and defendant were copartners, and prior to June 22, 1885, had been negotiating for the purchase by one or the other of his copartner's interest in the firm assets and business, with the understanding that a valuation should be placed upon the property, over and above the firm debts and liabilities, to serve as a basis for an offer on either side to buy or sell. During these negotiations, which were verbal, and on June 22, 1885, complainant made a written offer to defendant to buy or sell on the basis of $16,500, the purchaser to assume all company liabilities, and give sufficient security for their payment and of the purchase price. Defendant on the next day accepted complainant's offer in writing, on the terms mentioned therein, and afterwards claimed that the letters constituted a complete sale, and refused to have anything more to do with the joint business. *Held*, that the letters did not constitute a completed sale; that complainant's offer looked towards further agreements as to security for the purchase price and indemnity for the payment of the firm debts, and was only one of

be finally settled, must comprise all the terms which the parties intend to introduce into it. "An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a

the steps leading to a sale, and contemplated a meeting of the parties, if accepted, and a completion of the transaction.

In Topliff v. McKendree, 88 Mich. 148, 50 N. W. R. 109, the defendant, a stock-broker in D., wrote plaintiffs, stock-brokers in B., offering to sell them one hundred shares of mining stock at $41, adding: "Can ship it to you, I guess, with draft attached." Plaintiffs answered by asking whether defendant would sell part of such shares, and for how long the offer held good. Two days later, plaintiffs telegraphed that they would take the stock, asking defendant to forward it, with draft attached, and also wrote him to the same effect. *Held*, (1) that this correspondence did not make a completed contract, as plaintiffs did not bind themselves to accept the stock and pay for it in D., nor did defendant, by the phrase in his first letter, "Can ship it to you, I guess, with draft attached," absolutely bind himself to send the stock to B.; and hence the manner and place of delivery were left open to future negotiations between the parties. (2) Defendant's reply to plaintiffs' offer to take the one hundred shares, stating that he was unable as yet to furnish the stock, but that he had no doubt about his ability to get it, giving his reasons therefor, does not constitute a binding agreement by defendant to procure the stock. McDonald v. Bewick, 51 Mich. 79, 16 N. W. R. 240; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. R. 37; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. R. 155, were cited.

In Felthouse v. Bindley, 11 C. B. (N.S.) 869, a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered 30*l.* The uncle wrote back saying: "Your price, I admit, was thirty guineas; I offered 30*l.*, never offered more, and you said the horse was mine; however, as there may be a mistake about him, I will split the difference, 30*l.* 15*s.*, I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at 30l. 15s.*" This letter was dated the 2d of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. *Held*, that there had been no complete contract between the uncle and the nephew, because the latter had never communicated to the former any assent of the sale at 30*l.* 15*s.*; that the uncle had no right to put upon his nephew the burden of being bound by the offer unless rejected, and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was nonsuited on the ground that he

man enters into an agreement until the terms of that agreement are settled."

Where, therefore, the negotiations have not yet been crystallized into a complete offer and acceptance, or where a dis-

had no property in the horse at the date of the alleged conversion.

In Appleby v. Johnson, L. R. 9 C. P. 158, the plaintiff wrote to the defendant proposing to enter his services as salesman upon certain terms, including, among others, a commission upon all sales to be effected by him, for which purpose a list of merchants with whom he should deal was to be prepared. The defendant replied as follows: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; *but I think we are quite agreed on all.* We shall, therefore, expect you on Monday;" and the postscript added: "I have made a list of customers which we can consider together." *Held*, not to be an absolute and unconditional acceptance of the defendant's proposal.

In Wardell v. Williams, 62 Mich. 50, 28 N. W. R. 796, defendant agreed in *writing* to sell to plaintiff his farm for $39,000, payable as follows: $12,000 in cash, and the balance on or before four years from the date of a mortgage to be given as security for such deferred payment, plaintiff to have the privilege of paying $1,000 or more at any time during the four years on account of the unpaid principal. The agreement further stated that the farm had been subdivided into lots; that the parties were to agree to the valuation of *each* lot, and defendant agreed, on the making of such optional payments, to release lots of equal value to such payments, such agreed valuations to be placed on the plat of said farm.

The time for accepting this *offer* of sale was limited to twenty days, prior to the expiration of which plaintiff *verbally* accepted the offer, and requested defendant to prepare his deed. Defendant answered that the agent of an insurance company which held a mortgage on the land was then absent, and would not return until the following Tuesday, which would prevent his obtaining a discharge of the mortgage until that date; and it being suggested by plaintiff that the twenty days' option would expire before the date named, defendant said that would make no difference,—that he would carry out the contract even after sixty days.

Plaintiff made no tender of the cash payment, or of any deed or mortgage, executed or to be executed, and before the Tuesday arrived, and after the expiration of the twenty days, defendant sold the land to another party.

Held, in a suit brought to recover damages for the breach of the alleged contract for sale, that the offer did not constitute a completed contract, but upon its face looked to future action and negotiations between the parties to determine and agree upon the valuation to be placed upon the lots, and that this part of the offer was an essential part of the terms and conditions of sale and payment.

In order to pass title to personal property under a contract of sale,

pute is yet going on between the parties as to terms, or where the essential elements, such as number, price, term of credit, and the like, have not yet been settled, there can be no sale. As is said in one case,[1] "the agreement must be entire — as to the thing sold, its price, the time of delivery, and the terms of payment."

§ 235. Negotiations in contemplation of more formal contract.— Where it is evident from the words or conduct of the parties that they do not intend to be bound by their informal preliminary negotiations, but only by an express and formal contract to be afterwards entered into, they will not be bound until such formal contract has been made, unless its necessity be waived. Thus in one case[2] it appeared that the plaintiffs had advertised for tenders for goods, but saying expressly: "All contractors will have to sign a written contract after acceptance of tender." Defendant submitted a tender and received notice of its acceptance, but later in the same day wrote to the plaintiff that he declined to supply the goods. In an action to recover damages for his refusal, it was held that there was no contract between the parties. Parke, B., said: "It was clearly the intention of the parties that there should be no binding engagement until a written contract had been executed. The tender, though accepted, was not a contract."

"But on the other hand," as is said by Lord Cairns in a recent case,[3] "there is no principle of law better established than this: that even although parties may intend to have their agreement

the purchase price must be fixed, and, if credit is to be given, the time and terms of payment must be agreed upon. Hence an agreement for the sale of a quantity of ore for a price per ton dependent upon that to be subsequently received by the vendee on its sale by him lacks an essential ingredient of a contract of sale, and cannot be enforced. Foster v. Lumbermen's Mining Co., 68 Mich. 188, 36 N. W. R. 171, citing Williamson v. Berry, 8 How. (U. S.) 544.

[1] Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. R. 462, citing Sievewright v. Archibald, 17 Q. B. 103; Gether v. Capper, 18 C. B. 865; Hamilton v. Terry, 11 C. B. 954.

[2] Guardians of the Poor v. Petch, 10 Exch. 610.

[3] Brogden v. Metropolitan Ry. Co., L. R. 2 App. Cas. 666.

To the same effect see Lewis v. Brass, 3 Q. B. D. 667; Rossiter v. Miller, 3 App. Cas. 1124; Bonnewell v. Jenkins, 8 Ch. D. 70.

expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of the complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form." At the same time, as Lord Cairns further remarks, "There are no cases upon which difference of opinion may be more readily entertained, or which are always more embarrassing to dispose of, than cases where the court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties."

§ 236. ——. In a late case,[1] the principle which governs in these cases is said to be this: "If there is a simple acceptance of an offer to purchase, accompanied by a statement that the

[1] Crossley v. Maycock, L. R. 18 Eq. 180. In this case the vendors of land, in a letter acknowledging the receipt of an offer of purchase, wrote as follows: "which offer we accept, and now hand you two copies of conditions of sale," and therewith inclosed a formal agreement with conditions of a special character. *Held*, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers.

In Methudy v. Ross, 10 Mo. App. 101, it is said: "The mere fact that a written contract was to be subsequently prepared does not show that a final agreement between the parties was not made, but it tends to show it: and, in this case, we think it clear that there was no contract to which the parties had agreed in all its terms; that there was to be a more explicit agreement which was to be reduced to writing; that this was not done, and that there was no meeting of minds."

In Ridgway v. Wharton, 6 H. L. Cases, 238, the Lord Chancellor said: "I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." And in the same case, Lord Wensleydale said: "An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the par-

acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it or by his solicitor, then until these conditions are accepted there is no final agreement such as the court will enforce."

§ 237. ——. Where the parties have intended to have their agreement reduced to writing, and a writing has been prepared which both agree contains the terms of their agreement, but both neglect to sign it, such writing, while it cannot take effect as a written contract, is the best evidence of what the actual agreement of the parties was.[1]

§ 238. **Acceptance must be communicated.**— There must, moreover, not only be acceptance of or assent to the offer, but that acceptance or assent must be communicated to the other party. A mere determination to accept, or a mental conclusion not evidenced by any outward act, is not enough. As stated by Mr. Benjamin, "the assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication, as, *e. g.*, in contracts by correspondence, the posting of the letter of acceptance; or the assent may be inferred from subsequent conduct; but an assent which is neither

ties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain."

In Lyman v. Robinson, 14 Allen (Mass.), 252, 254, it is said: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?"

[1] Bryant v. Smith, 87 Mich. 525, 49 N. W. R. 889.

communicated to the other party nor followed up by action, a mere 'mental assent,' as it is termed, is insufficient."[1]

§ 239. Manner of acceptance.— The offer, further, must not only be accepted, but it must be accepted in accordance with the terms expressly or impliedly prescribed for its acceptance.

[1] Benjamin on Sale, § 39.

In Felthouse v. Bindley, 11 Com. B. (N. S.) 869, 103 Eng. Com. Law, 868, it appeared that A and B verbally treated for the purchase of a horse by the former of the latter. A few days afterwards B wrote to A saying that he had been informed that there was a misunderstanding as to the price. A having imagined that he had bought the horse for £30, B that he had sold it for thirty guineas. A thereupon wrote to B proposing to split the difference, adding: "If I hear no more about him, I consider the horse is mine at 30*l.* 15*s.*" To this no reply was sent. No money was paid, and the horse remained in B's possession. Six weeks afterwards the defendant, an auctioneer who was employed by B to sell his farming stock, and who had been directed by B to reserve the horse in question, as it had already been sold, by mistake put it up with the rest and sold it. After the sale B wrote to A a letter which substantially amounted to an acknowledgment that the horse had been sold to him. *Held*, that A could not maintain an action against the auctioneer for the conversion of the horse, he having no property in it at the time the defendant sold it, B's subsequent letter not having (as between A and a stranger) any relation back to A's proposal.

In Brogden v. Metropolitan Ry. Co., L. R. 2 App. Cas., at p. 692, Lord Blackburn says: "But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV. (17 Edw. IV., T. Pasch case, 2) Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2*s.* 6*d.* for them, he might take them: that was the justification. That case is referred to in a book which I published a good many years ago (Blackburn on Contract of Sale, p. 190 et seq.), and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: 'This plea is clearly bad, as you have not shown the payment or the tender of the money:' but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly): 'moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the

It is entirely competent for the party who makes the offer to stipulate that it shall not be binding upon him unless its acceptance be communicated to him in a certain manner,[1] at a prescribed place,[2] or within a designated time;[3] and the person who seeks, by acceptance of such an offer, to bring a binding contract into existence, must show either that he has complied with the terms so fixed or that the other party has waived the necessity for such compliance.

Where, however, no express terms have been prescribed, the manner of acceptance is a matter to be deduced from the apparent intention of the parties as evidenced by their acts, sur-

plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact.' I take it, my lords, that that, which was said three hundred years ago and more, is the law to this day, and it is quite what Lord Justice Mellish, in Ex parte Harris. Law R. 7 Ch. App. 593, accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter; not, as it is put here, from the moment you make up your mind on the subject."

To the same effect: Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Jenness v. Iron Co., 53 Me. 20.

[1] Thus in Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. R. 1120, the parties had stipulated for an acceptance *in writing*, and the court said that no other method would suffice.

[2] Thus in Eliason v. Henshaw (1819), 4 Wheat. (17 U. S.) 225, an offer of purchase was made, stipulating for an acceptance "by return of wagon" to the place at which the offerer then was, namely, at Harper's Ferry. Instead of so replying, the other party sent his acceptance by mail to a different place, namely, to Georgetown. This letter was afterwards received, but the proposed buyer then declined to consummate the purchase. The court said that "an acceptance communicated at a place different from that pointed out by the plaintiffs in error [the proposers], and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with they were not bound by them."

[3] See *post*, § 244.

roundings or location, and by the consideration of what is convenient or usual in like cases.

§ 240. —— What constitutes.—"What shall constitute an acceptance," said Mr. Justice Marcy in the leading case of Mactier *v.* Frith,[1] "will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by messenger, a determination to accept returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formal determination to accept, communicated, or put in the proper way to be communicated, to the party making the offer, would doubtless complete the contract."

§ 241. —— Notice of acceptance by conduct.—It is evident from the foregoing principles that, unless the parties have stipulated otherwise, the acceptance of the offer need not be in any particular form and need not be evidenced by express words. The fact of the acceptance, and the communication of that fact to the proposer in any manner reasonably warranted by the situation, are the material things. Thus in one case,[2] it appeared that the plaintiff had sent to the defendant a number of *orders* for goods to be supplied as specified. The latter

[1] 6 Wend. (N. Y.) 103, 21 Am. Dec. 262. Followed in Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511.

Promise to give prompt attention, not an acceptance.—In Manier v. Appling, 112 Ala. 663, 20 S. R. 978, the proposer made an offer (an order) to buy goods. The party addressed replied acknowledging the receipt of the offer and said, "The same shall have prompt attention." *Held*, not an acceptance. Said the court: "Promise to give the proposal attention was not a promise of acceptance. It was not an assent to it. It was no more than a courteous promise to give it consideration."

[2] Jordan v. Patterson (1896), 67 Conn. 473, 35 Atl. R. 521.

replied, saying, "We are in receipt of the following *contracts*, for which we thank you," and appended to this a detailed description of the orders. Part of the goods only having been supplied, the defendants insisted that their letter was not an acceptance; and, if it was an acceptance at all, it was an acceptance of some one of the orders only and not of all. But it was held that the letter constituted a sufficient acceptance of the orders and of all of them.

§ 242. ——. So, that the party addressed acted upon the offer to the knowledge of the person offering may be a sufficient notice of acceptance. Thus, an offer to buy goods or an order for goods may be accepted by the shipment and delivery of the goods without a formal letter of acceptance,[1] providing such acceptance be in due season.[2] But this form of acceptance, like all others, unless this condition be waived, must correspond with the offer made. Hence an order for a given quantity of goods cannot be deemed to have been accepted, so as to bind the person ordering, merely by the shipment of a less quantity;[3] though, as against the shipper, the sending of part may be evidence of an acceptance of the whole order;[4] nor would the person ordering the goods be required to accept a less quantity,

[1] Taylor v. Jones, L. R. 1 Com. P. Div. 87; Crook v. Cowan, 64 N. C. 743; McCormick Harvesting Mach. Co. v. Richardson (1893), 89 Iowa, 525, 56 N. W. R. 682.

[2] As to which, see §§ 244, 245.

[3] Bruce v. Pearson (1808), 3 Johns. (N. Y.) 534.

[4] Thus in Eckert v. Schoch (1893), 155 Pa. St. 530, 26 Atl. R. 654, it appeared that defendant wrote to plaintiff as follows: "If you can pay 83½ c. on track here for prime Pa. wheat, will send you sample." On the following day plaintiff replied by telegram: "Ship quick five cars prime red wheat to Stemton as trial lot." On same day plaintiff confirmed this order by letter. Defendant replied on the same day: "I send you sample of wheat. I will send one car soon, and if satisfactory will ship more. I ship this at price named." Plaintiff replied that sample was satisfactory, and urged haste in sending the five cars. After several days and more urging, defendant wrote: "I ship one car to Stemton on this day, contents 444 bus. Will ship one more on Monday." No more was shipped, and defendant denied the existence of any agreement for five cars. The court, however, held that defendant by this correspondence and conduct had accepted the offer for five cars.

but if he does accept the less quantity and appropriates the goods to his own use, he will be deemed to have waived the requirement of a full delivery as a condition precedent, and he will be liable to pay *pro tanto* for the part actually received.[1]

§ 243. ——. So, though one has not ordered goods shipped to him, yet if, with knowledge of the facts, he retains them and uses them, or exercises over them acts of ownership, he will be deemed to have assented to their sale to him and will be liable as a purchaser.[2]

§ 244. **Time of acceptance.**— Where the period within which an offer may be accepted is limited by the terms of the offer, the offer, if not withdrawn, is to be regarded as an open and continuing one during that period only, and it must be accepted, if at all, within the time so fixed. If not so accepted the offer expires by its own limitations, and no subsequent acceptance will suffice unless the proposer consents.[3] Where, on the other

[1] Oxendale v. Wetherell, 9 B. & C. 386; Richardson v. Dunn, 2 Q. B. 222; Hart v. Mills, 15 M. & W. 85; Avery v. Willson, 81 N. Y. 341, 37 Am. R. 503, distinguishing Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183.

[2] Thompson v. Douglass, 35 W. Va. 337, 13 S. E. R. 1015.

[3] "An acceptance after the time limited in the offer will not bind the person making the offer, unless he assents to the acceptance so made after it is made." Atlee v. Bartholomew, 69 Wis. 43, 33 N. W. R. 110, 5 Am. St. R. 103, citing McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278; Larmon v. Jordan, 56 Ill. 204; Boston, etc. R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Adams v. Lindsell, 1 Barn. & Ald. (Eng.) 681; Eliason v. Henshaw, 4 Wheat. (U. S.) 225. "In our law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit: that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact, the proposal so limited comes to an end itself at the end of that time and there is nothing for the other party to accept." Union National Bank v. Miller, 106 N. C. 347, 11 S. E. R. 321, 19 Am. St. R. 538, citing Pollock on Contracts, 9; Larmon v. Jordan, *supra;* Boston, etc. R. R. Co. v. Bartlett, *supra;* Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Cheney v. Cook, 7 Wis. 413; Maclay v. Harvey, 90 Ill. 525, 32 Am. R. 35; Dunlop v. Higgins, 1 H. L. Cas. 387. See also Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Longworth v. Mitchell, 26 Ohio St. 334; Potts v. Whitehead, 20 N. J. Eq. 55; Weaver v. Burr, 31 W. Va. 736, 8 S. E. R. 743; Carr v. Duval, 14 Pet. (39 U. S.) 77.

In James v. Marion Fruit Jar Co. (1896), 69 Mo. App. 207, the offerer

hand, the period for its acceptance is not fixed, the offer must be accepted within a reasonable time.[1]

§ 245. ——. What is a reasonable time depends here, as in other cases, upon the particular circumstances of each individual case.[2] If the parties are present and personally negotiating, that reasonable time will, unless further time is granted, be limited to the period of such negotiation, and if, without stipulating for further time, the parties separate before a bargain is concluded, offers then made will be deemed to be withdrawn and cannot subsequently be accepted.[3] Where the parties are not thus personally present and orally negotiating, but are conducting their negotiations otherwise, as by letter or telegram, the offer, unless previously withdrawn, will be deemed to continue until the letter or telegram containing it is received, and the party addressed has had a fair opportunity to answer it.[4] The subject of communication by letter or telegram will be more fully considered in a later section.[5]

§ 246. **Question of acceptance, how determined.**— The question whether or not the offer has been accepted is one which may address itself to the court or jury under varying circumstances. Where the negotiations were in writing,[6] or

had telegraphed an offer saying that prices were higher and advancing, and saying: "Wire instantly or this is withdrawn." This message reached the town of its destination at 7:05 P. M. on Saturday evening, but was not delivered until about 10 o'clock. At 10:15, on the following Monday, the offer was accepted by telegram. The offerer responded: "We specified instant answer. Price now $2 per gross higher." *Held*, that the acceptance on Monday was not in time.

[1] Craig v. Harper, 3 Cush. (Mass.) 158; Beckwith v. Cheever, 21 N. H. 41; Martin v. Black, 21 Ala. 721; Chicago, etc. R. Co. v. Dane, 43 N. Y. 240; Trounstine v. Sellers, 35 Kan. 447, 11 Pac. R. 441; Ferrier v. Storer, 63 Iowa, 484, 19 N. W. R. 288.

[2] Martin v. Black, *supra;* Dunlop v. Higgins, *supra;* Mactier v. Frith, *supra;* Loring v. Boston, 7 Metc. (Mass.) 409; Chicago, etc. Ry. Co. v. Dane, 43 N. Y. 240; Stone v. Harmon, 31 Minn. 512, 19 N. W. R. 88; McCurdy v. Rogers, 21 Wis. 197; Judd v. Day, 50 Iowa, 247.

[3] Averill v. Hedge, 12 Conn. 424; Cooke v. Oxley, 3 T. R. 653.

[4] Averill v. Hedge, 12 Conn. 424.

[5] See *post*, § 247 et seq.

[6] Jordan v. Patterson, 67 Conn. 473, 35 Atl. R. 521; Eckert v. Schoch, 155 Pa. St. 530, 26 Atl. R. 654; James v. Marion Fruit Jar Co., 69 Mo. App. 207.

the facts are not disputed, the question of acceptance is one of law to be determined by the court; but where the matter is to be decided by reference to disputed facts, the question must be regarded as for the jury.

§ 247. Communication by mail, telegraph, etc.— A person who makes an offer by mail, telegraph or other public agency, thereby adopts it as his agent for the transmission of his offer, and he therefore assumes the risk of his agent's failure to deliver the message promptly, or at all, and also, within the limits applicable to other agents, the risk of his agent's failure to deliver it correctly.[1] Such an adoption of a public agency by the proposer is also, where no other direction is given, deemed equivalent to an invitation to the party addressed to communicate his reply by the same agency; and it is well settled, therefore, that if the person addressed accepts the offer, and, in due time, finally and irrevocably delivers his acceptance to the same agency to be transmitted to the proposer,[2] the contract thereby becomes complete, and the failure of the adopted agency, without the fault of the acceptor, to transmit the acceptance to the proposer, either promptly, accurately, or at all, does not change the result.[3] If, however, this failure is attrib-

[1] Saveland v. Green, 40 Wis. 431; Scott & Jarnagin on Telegraphs, § 345.

[2] Thus in Trounstine v. Sellers, 35 Kan. 447, 11 Pac. R. 441, it is said: "The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. 'The assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication.' (Benjamin on Sales, 54.) Where parties are distant, and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing."

[3] Dunlop v. Higgins, 1 H. L. Cases, 381; Household F. Ins. Co. v. Grant, 4 Ex. Div. 216, 6 Eng. Rul. Cas. 115, 19 Rev. R. 415; Adams v. Lindsell, 1 B. & Ald. 681, 6 Eng. Rul. Cas. 80; In re Imperial Land Co., L. R. 7 Ch. App. 587; Townsend's Case, L. R. 13

ntable to the fault of the acceptor, as in misdirecting his reply, or delaying it beyond the proper time, or in employing careless agents to transmit it, the contract will not thereby be completed.[1]

§ 248. —— **Method of acceptance in these cases.** — The adoption by the proposer of a given agency for the transmission of his offer is often deemed to be not only equivalent to an invitation to reply by the same means, as stated in the preceding section, but also to be a conclusive designation of that agency as the one to be employed in the transmission of the acceptance, so as to cast upon the acceptor the risk of employing any other. Though the language of many of the cases appears to give countenance to this idea, it is nevertheless to be regarded as too narrow a view. The proposer is not, of course, responsible for the fidelity of *any* agency which the acceptor may see fit to employ; but where the proposer does not stipulate otherwise he must ordinarily be held to invite a response by the usual and natural agency as determined by the circumstances of the case. Thus where an offer was made by messenger, but the acceptance was by mail, after the mailing but before the receipt of a withdrawal of the offer, it was said by

Eq. 148; Potter v. Sanders, 6 Hare, 1; Stocken v. Collin, 7 Mees. & Wels. 515; Hebb's Case, L. R. 4 Eq. 9; Taylor v. Insurance Co., 9 How. (U. S.) 390; Patrick v. Bowman, 149 U. S. 411, 37 L. Ed. 790; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Abbott v. Shepard, 48 N. H. 14; Hutcheson v. Blakeman, 3 Metc. (Ky.) 80; Hamilton v. Insurance Co., 5 Barr (Pa.), 339; Levy v. Cohen, 4 Ga. 1; Falls v. Gaither, 9 Port. (Ala.) 614; Averill v. Hedge, 12 Conn. 436; Wheat v. Cross, 31 Md. 99, 1 Am. R. 28; Potts v. Whitehead, 20 N. J. Eq. 55; Washburn v. Fletcher, 42 Wis. 152; Haas v. Myers, 111 Ill. 421, 53 Am. R. 634; Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; Ferrier v. Storer, 63 Iowa, 484, 50 Am. R. 752, 19 N. W. R. 288; Durkee v. Vermont Cent. R. R. Co., 29 Vt. 127.

In Massachusetts it has been thought that the contract was not complete until the acceptance was received. McCulloch v. Eagle Ins. Co., 1 Pick. 278; Lewis v. Browning, 130 Mass. 173. But is this true, since Brauer v. Shaw (1897), 168 Mass. 198, 46 N. E. R. 617, 60 Am. St. R. 387?

[1] Mackay v. Harvey, 90 Ill. 525, 32 Am. R. 35; Thayer v. Insurance Co., 10 Pick. (Mass.) 326; Bryant v. Booze, 55 Ga. 438.

Lord Herschell, in the English court of appeal,[1] that "where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." And Kay, L. J., in the same case, declared the rule thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post." The same rule would doubtless extend also to the telegraph.[2]

Whether the agency employed is a "natural and ordinary mode of transmitting such an acceptance" is said to be a question of fact for the jury.[3]

§ 249. ——. Of course, if the acceptance is actually received in due time, there can ordinarily be no room for question as to the suitability of the agency employed in transmitting it;[4] though if the proposer directs the employment of a particular agency, he could not, except under very unusual circumstances, be charged with the risk of any other; and it would also be doubtless competent for him to expressly stipulate that he should not be charged unless the acceptance came through a specified channel, whether it reached him or not.[5]

[1] Henthorn v. Fraser, [1892] 2 Ch. 27.

In Wilcox v. Cline (1888), 70 Mich. 517, 38 N. W. R. 555, an offer of sale was made by writing delivered by Cline to Wilcox at Bellefontaine, Ohio. Wilcox lived at Detroit, Mich., and Cline at Frederick City, Md. Nothing was said as to the method of acceptance, but Wilcox had a prescribed time within which to accept, and after the delivery of the offer each party went to his home. Wilcox afterwards, in due time, accepted the offer by mail. *Held*, sufficient. Said the court: "We think the facts show conclusively that the parties intended from the beginning that the acceptance should be transmitted by mail."

[2] In Perry v. Mt. Hope Iron Co. (1886), 15 R. I. 380, 5 Atl. R. 632, 2 Am. St. R. 902, an offer made in person was left open for acceptance until next day. Plaintiff lived in Providence, R. I., and defendant had its office in Boston. Plaintiff sent an acceptance by telegraph. *Held*, that the contract was completed at Providence when the telegram was sent.

[3] In Perry v. Mt. Hope Iron Co., *supra*.

[4] Perry v. Mt. Hope Iron Co., *supra*.

[5] See Eliason v. Henshaw, 4 Wheat. (17 U. S.) 225.

§ 250. ——. It is also competent for the proposer to stipulate, either expressly or impliedly, that he is to be bound only in case the acceptance actually reaches him; and where he does this, he will not be bound unless it is received, even though the agency employed for transmitting the reply would otherwise have been such as to charge him with the risk.[1]

§ 251. —— **Time of acceptance in these cases.**— The due time within which the acceptance must be transmitted depends upon the principles stated in a preceding section.[2] If the time be limited, either by express words or the nature of the subject, or the evident intention, the answer must be transmitted within that time.[3] In other cases the answer must be transmitted

[1] Lewis v. Browning, 130 Mass. 173 [citing Theisiger, L. J., in Household, etc. Ins. Co. v. Grant, 4 Ex. Div. 223; Pollock on Contracts (2d ed.), 17; Leake on Contracts, 39, note]. In this case the proposer had written that, if he did not hear from the other by a given date, he should conclude that his offer was not accepted. To like effect: Haas v. Myers, 111 Ill. 421, 53 Am. R. 634; Vassar v. Camp, 11 N. Y. 441.

[2] See *ante*, § 244.

[3] In Dunlop v. Higgins, 1 H. L. Cas. 387, the Lord Chancellor says: "Where an individual makes an offer by post, stipulating for, or by the nature of the business having a right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness such as may not be required where he is only endeavoring to excuse himself from a liability." Where the nature of the business demanded a prompt answer, it was held that the words "you will confer a favor by giving me your answer by return mail," do, in effect, stipulate for an answer by return mail. Maclay v. Harvey, 90 Ill. 525, 32 Am. R. 35, citing Taylor v. Rennie, 35 Barb. (N. Y.) 272. Where an offer by telegraph states that the sender "must have reply early to-morrow," a reply sent late in the evening of that day is not in time. Union National Bank v. Miller, 106 N. C. 347, 19 Am. St. R. 538, 11 S. E. R. 321.

In case of a proposition by telegraph to sell certain goods, the market for which was subject to sudden and great fluctuations, an immediate answer should be returned, and an acceptance of such proposition telegraphed after a delay of twenty-five hours from the time of its receipt was not an acceptance within a reasonable time and did not operate to complete the contract. Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. (U. S. C. C.) 431.

Where a telegram making an offer

within a reasonable time,[1] or, as stated in a case already referred to,[2] the offer will remain open only until the party addressed has had a fair opportunity to answer it. If the delivery of the offer was delayed by the fault of the sender, the time for its acceptance dates from its actual receipt, even though the sender may in the meantime have sold the goods to others,[3]

demanded an instant acceptance, but was not received until ten o'clock on Saturday night, and the answer was delayed until Monday, the delay was in this case unreasonable, and the acceptance did not bind. The court said: "This offer plaintiffs received on Saturday night at 10 P. M., but instead of wiring back their acceptance that night through the same agency, as they might have done, they delayed action until the second day thereafter. It is true that the next day was Sunday, but no reason was shown why acceptance was not wired back on the evening of the receipt of the offer. If the time for acceptance had not been limited by the terms of the offer, the delay of acceptance doubtless would not, under the circumstances, be deemed unreasonable or untimely. But the plaintiffs were admonished by the very terms of the offer that prompt and immediate action was required of them if they desired to accept the defendant's offer, and that if they did not so act the offer was withdrawn. They were warned in the same connection that the prices were advancing, and that there was an emergency calling for prompt and immediate action on their part. We feel justified in ruling, as a matter of law, that the acceptance of the plaintiffs, thirty-six hours after the receipt of the offer, even under the circumstances shown by the evidence, was not an acceptance within the time required by the terms of the offer itself. The defendant had a perfect right, by the terms of the offer, to limit the time for its acceptance. The time for acceptance specified in the offer was as much a term thereof as the price, or the kind and quantity of the goods. After the specified time passed without acceptance the offer was determined. Clark on Contracts, 39, 40, 52. It follows from these observations that the acceptance of the plaintiffs had no effect." James v. Marion Fruit Jar Co., 69 Mo. App. 207.

[1] Dunlop v. Higgins, 1 H. L. Cas. 387; Duncan v. Topham, 8 Com. Bench, 225; Minnesota Oil Co. v. Collier White Lead Co., 4 Dill. (U. S. C. C.) 431; Stockham v. Stockham, 32 Md. 196; Abbott v. Shepard, 48 N. H. 14.

An offer by letter, dated May 16, 1884, and made by the offerer "solely from a feeling of friendship" towards the offeree, to purchase certain shares of stock "at any time after January 1, 1886, if at that time" the latter shall so desire, must be accepted by that date or within a reasonable time thereafter, and an acceptance of the offer sent on July 9, 1886, is not within a reasonable time. Park v. Whitney, 148 Mass. 278, 19 N. E. R. 161.

[2] Averill v. Hedge, 12 Conn. 424, citing Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

[3] Adams v. Lindsell, 1 B. & Ald. 681.

unless the fact of the delay be obvious to the receiver and he could not reasonably rely upon it as continuing without inquiry.

§ 252. **Right to withdraw offer.**—A mere offer to enter into a contract can, evidently, operate only during the period of its continuance. The very purpose of its making, however, contemplates that it shall continue until the other party can act upon it, unless it sooner expires by its express or implied limitations, or is sooner revoked. But, being purely voluntary, it is equally obvious that the party making the offer may retract it at any time before it has ripened into a contract by acceptance.[1] As stated by Lush, J., of the Queen's Bench Division:[2] "It is clear that a unilateral promise is not binding, and that if a person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end.[3] But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it.[4] 'Common sense tells us,' said Lord Cottenham,[5] 'that transactions cannot go on without such a rule.' It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But, if it is retracted, there is an end of the proposal."

§ 253. —— **Voluntary offer may be retracted, though time given for its acceptance.**—It is equally true that a voluntary

[1] Cooke v. Oxley, 3 T. R. 653; Stevenson v. McLean, 5 Q. B. Div. 346; Dickinson v. Dodds, 2 Ch. Div. 463; Byrne v. Van Tienhoven, 5 C. P. Div. 344; Bristol Bread Co. v. Maggs, 44 Ch. Div. 616; Larmon v. Jordan, 56 Ill. 204; Paddock v. Davenport, 107 N. C. 710, 12 S. E. R. 464; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. R. 1120.

[2] In Stevenson v. McLean, L. R. 5 Q. B. Div. 346.

[3] Citing Routledge v. Grant, 4 Bing. 653.

[4] Citing Adams v. Lindsell, 1 B. & A. 681.

[5] In Dunlap v. Higgins, 1 H. L. Cas. 381.

offer may be retracted at any time before acceptance, even though the proposition was in writing, and the proposer has expressly stated that he would permit the offer to remain open for a given period, which has not yet expired.[1] The promise to allow time for acceptance, being without consideration, is, of course, merely *nudum pactum*, and the offer may be revoked by the proposer before acceptance without legal liability.

§ 254. —— Voluntary offer may be revoked though declared irrevocable.— So a voluntary offer, as, for example, an order for goods, may be revoked at any time before acceptance, even though it may have been in writing, and contained an express stipulation that it should be irrevocable.[2] Such a condition, being without consideration, stands upon no better ground than the offer or order itself.

§ 255. —— Unaccepted offer does not constitute such a contract as to exclude parol evidence.— So a written offer or order, before acceptance, does not constitute such a written contract between the parties as will exclude parol evidence as to other stipulations which are not included in the order.[3]

[1] Routledge v. Grant, 4 Bing. 653; Dickinson v. Dodds, 2 Ch. Div. 463; Cheney v. Cook, 7 Wis. 413; School Directors v. Trefethren, 10 Bradw. (Ill.) 127; Weiden v. Woodruff, 38 Mich. 130; Burton v. Shotwell, 13 Bush (Ky.), 271; Tucker v. Lawrence, 56 Vt. 467; Quick v. Wheeler, 78 N. Y. 300; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. R. 1120.

[2] This is well illustrated, as is also the rule of the following section, by the recent case of National Refining Co. v. Miller, 1 S. D. 548, 47 N. W. R. 962, where it was expressly stipulated that the offer (an order) should not be subject to countermand. Peck v. Freese, 101 Mich. 321, 59 N. W. R. 600, and Challenge Wind Mill Co. v. Kerr, 93 Mich. 328, 53 N. W. R. 555, are to the same effect.

[3] In Weiden v. Woodruff, 38 Mich. 130, Woodruff sought to recover upon an order addressed to him stating: "You will please send me galvanized lightning rods for my house, within sixty days, for which I will give you thirty-five cents per foot, due when work is completed. H. Weiden." Plaintiff proved that under this order he had delivered two hundred and six feet of lightning rod. Defendant, claiming that this written instrument did not constitute a complete binding contract between the parties, offered to prove the conversation between plaintiff's agent and defendant at the time this order was given; that defendant reserved

§ 256. —— Agreement upon consideration not to withdraw offer.— It is undoubtedly competent for the parties, upon a sufficient consideration, to agree that the offer shall not be withdrawn within a specified time, and such an agreement is binding. The consequences of the breach of such an agreement are, however, material. If the offer be a mere proposal to enter into a contract, and the proposer, in violation of his agreement to leave the proposal open, refuses to do so, and revokes it, he is clearly liable, but his liability will be, not for the breach of the contract which was never made, but for the breach of the agreement to leave the offer open so that such a contract might be made. No title to the chattel to be sold could pass by such an agreement because no contract of sale has been entered into. This must also be the result in every case in which the proposal does not amount to a present offer of sale that requires no further act on the part of either party than a mere acceptance according to its terms. If, however,

the right to countermand the order within sixty days; that he did in fact within that time, and before any of the rod was delivered, actually countermand the order; and he further offered to prove that at the time the order was given the number of feet of rod to be delivered was agreed upon. This evidence was all objected to and excluded, and plaintiff recovered judgment for the amount claimed.

Said the court: "I. This written order did not constitute such a written contract between the parties as would exclude parol evidence, or prevent the defendant from showing any further agreement entered into between the parties at the time the order was given, and not embraced therein. Richards v. Fuller, 37 Mich. 161; Phelps v. Whitaker, 37 Mich. 72, and cases there cited.

"II. This instrument was but a mere order. Woodruff was not bound by it in any way to deliver any rod. Until accepted by him it was not binding upon either party. Woodruff testified that he passed upon all orders taken by his agents; if he considered the parties good he delivered the orders, and that if he doubted the responsibility of the party who gave the order, he had the right to reject it. Under such circumstances it is preposterous to say that there was a valid binding contract between the parties before Woodruff had accepted the order, and in some way notified the defendant of that fact. Even independent of such testimony, before an actual acceptance and notice thereof, the defendant had the right to withdraw his order. It is similar to an order given a merchant for goods, which, before acceptance, the party would have a right to withdraw. 1 Parsons on Con. (5th ed.) 483."

the proposal is such a complete offer of present sale, an acceptance of it within the time specified may operate to transfer the title notwithstanding an attempted revocation of the offer by the proposer.

§ 257. —— How offer revoked — Revocation must be actually communicated.— While the offer is, in general, as has just been seen, subject to revocation by the proposer at any time before it is accepted, it is obvious that such revocation, during the time that the offer might otherwise be accepted, must, in order to be effectual, be communicated to the other party.[1] The offer has been communicated to the latter for the purpose of obtaining his acceptance of it, and, clearly, if it is to be withdrawn from his consideration during the period in which he would otherwise be still invited to accept it, the fact of such withdrawal must in some way be brought home to him.

No particular method of communicating the fact of the revocation would ordinarily be requisite. Notice might be given expressly, or the fact might be made apparent from acts and conduct leading necessarily to that conclusion; as where one who has offered a specific chattel for sale to A, sells it to B, as A knows, before the latter has accepted the offer.[2] The death

[1] Stevenson v. McLean, 5 Q. B. Div. 346; Byrne v. Van Tienhoven, 5 Com. Pl. Div. 344; Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 390.

[2] In Dickinson v. Dodds, 2 Ch. Div. 463, Mellish, J., says: "If a man makes an offer to sell a particular horse in his stable, and says 'I will give you until the day after to-morrow to accept the offer,' and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say 'I accept,' so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead; and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has

of the proposer will also operate as a revocation;[1] as would doubtless, in many cases, his subsequently occurring insanity[2] or bankruptcy.[3]

§ 258. —— **Mailing letter, etc., not enough.**— Where the offer was made by mail or telegraph, the requirement of actual communication of its withdrawal applies with full vigor, and it is abundantly settled that, unlike the case of the acceptance, the mere depositing of the letter of withdrawal in the post-office, or the delivery of a message to the telegraph company for transmission, will not operate a revocation, and the offer will remain open until the notice of its revocation is actually received.[4]

If, therefore, an acceptance of the offer has been duly mailed, it will not be affected by a revocation of the offer mailed before the acceptance was mailed, but not received until afterwards.[5] The acceptance made by the post is not affected by the fact that a letter of revocation is on its way. This would be true, moreover, even though the letter of acceptance, duly mailed, were delayed or never received.[6]

§ 259. —— **Offer under seal.**— "An exception to the general rule as to the revocability of an offer," says Sir William

made an offer dies before it is accepted, it is impossible that it can be then accepted, so when once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer." Followed in Coleman v. Applegarth, 68 Md. 21, 6 Am. St. R. 417. To like effect: School Directors v. Trefethren, 10 Bradw. (Ill.) 127. See also Gilbert v. Holmes, 64 Ill. 548; Ahern v. Baker, 34 Minn. 98, 24 N. W. R. 341; Walker v. Denison, 86 Ill. 142; Bissell v. Terry, 69 Ill. 184.

[1] See preceding note; Anson on Contracts (7th ed.), 27.

[2] See Mechem on Agency, § 254.

[3] See Mechem on Agency, § 263.

[4] Stevenson v. McLean, 5 Q. B. Div. 346; Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 390; Wheat v. Cross, 31 Md. 99, 1 Am. R. 28; Kempner v. Cohn, 47 Ark. 519, 58 Am. R. 775, 1 S. W. R. 869; Sherwin v. National Cash Register Co., 5 Colo. App. 162, 38 Pac. R. 392.

[5] Byrne v. Van Tienhoven (1880), 5 Com. Pl. Div. 344, 49 Law Jour. Com. Pl. 316, 42 Law Times, 371; Henthorn v. Fraser, [1892] 2 Ch. 27, C. A.

[6] Dunlop v. Higgins (1848), 1 H. L. Cas. 381; Household, etc. Ins. Co. v. Grant (1879), 4 Ex. Div. 216, 48 L. Jour. Ex. 577, 41 L. Times, 298, 6 Eng. Rul. Cas. 115.

Anson, "must be made in the case of offers under seal. Such an offer cannot be revoked: even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence."[1]

§ 260. —— Lapse of offer — Notice.— Where the offer was, by its express terms, to remain open for a prescribed period, it will, unless previously accepted, lapse and expire by its own limitation at the expiration of that period, and no notice of such expiration is necessary.[2] So though no time was expressly prescribed, the offer must, as has been seen, be accepted if at all within a reasonable time, and if not so accepted it also will lapse and expire without notice when that reasonable time has expired.[3]

But where the offer is thus one which may be accepted within a reasonable time, and the other party signifies his acceptance of it within a time which he could fairly have supposed to be reasonable, good faith, it is held,[4] requires that the proposer, if he intends to retract on account of the delay, shall make known that intention promptly. "If he does not, he must be regarded as waiving any objection to the acceptance as being too late."

§ 261. —— Waiver of revocation.— A party who has taken all necessary steps to withdraw an offer may, nevertheless, with the consent of the other party, waive his revocation and complete the contract. If, therefore, a person who has ordered goods withdraws his offer, but, on being advised that the goods have been shipped, is requested to receive them and hold for further advice, and does receive the goods and disposes of them as his own, the withdrawal will be deemed to have been waived by both parties, and the vendor cannot treat the contract as thereby rescinded.[5]

[1] Anson on Contracts (7th ed.), 30, citing Doe v. Knight, 5 B. & C. 71; Xenos v. Wickham, L. R. 2 H. L. 296.

[2] Leake on Contracts (1878), p. 40.

[3] See Ramsgate Hotel Co. v. Montefiore, L. R. 1 Exch. 109.

[4] Phillips v. Moor (1880), 71 Me. 78.

[5] Sullivan v. Sullivan, 70 Mich. 583, 38 N. W. R. 472, 76 Mich. 101, 42 N. W. R. 1090.

§ 262. **Withdrawal of acceptance.**— "An acceptance, while in course of communication," says Mr. Leake,[1] "may be intercepted in fact, or may be revoked by an actual communication to that effect before the acceptance is received; but as the communication of the acceptance completes the contract, it cannot afterwards be revoked without the consent of the other party.

"A letter once posted cannot be withdrawn by reason of the regulations of the postoffice;[2] but the operation of the letter may be revoked by any other means, if possible, before it is actually delivered.[3] Thus, if a letter accepting a proposed contract be posted, and a subsequent letter recalling the acceptance be also posted, and arrive at the same time with the former letter, there is no contract.[4] A revocation or change of intention as to acceptance, not communicated until after the acceptance is complete, is void of operation."

II.

Of Unilateral Contracts.

§ 263. **Unilateral contracts — Options.**— Closely allied to the subject of the preceding sections is that of the so-called option or unilateral agreement, which presents itself in various forms, but usually in that of an undertaking by one party to supply such goods as the other may require during a given period, though such other party may not bind himself to take any.

Upon this subject Mr. Bishop uses strong language,[5] saying that "unless both are bound, so that an action could be maintained by either against the other for a breach, neither will be bound.[6] This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration; for, where it is admitted

[1] Leake on Contracts (1878), p. 46.

[2] In the United States the practice is often otherwise.

[3] Citing Cockburn, C. J., in Newcombe v. De Roos, 2 El. & El. 271.

[4] Dunmore v. Alexander (1830), 9 Shaw & Dunlop (Scotch), 190; Langdell's Cas. on Contr. 112.

[5] Bishop on Contracts, § 78.

[6] Citing Stiles v. McClellan, 6 Colo. 89; Townsend v. Fisher, 2 Hilton (N. Y.), 47; Ewins v. Gordon, 49 N. H. 444.

that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this; if there are any really so, they are not to be followed. In one case,[1]

[1] Great Northern Ry. Co. v. Witham, L. R. 9 C. P. 16, 7 Eng. R. 130.

In Campbell v. Lambert, 36 La. Ann. 35, 51 Am. R. 1, the parties signed a paper in which they declared that they had "mutually agreed with each other" that Lambert should furnish and deliver to Campbell such quantities of coal as the latter might require during a certain year "to the extent of sixty thousand barrels, with the privilege of twenty thousand barrels or more, to be delivered with dispatch in such quantities and at such places" as Campbell should designate, Lambert to receive a certain price per barrel payable at the end of each month. Lambert delivered thirty-three thousand three hundred and forty-five barrels, and then, owing to a great increase in price and large and rapid orders from Campbell, refused to deliver more. Campbell thereupon demanded the balance of the eighty thousand barrels, and upon failure to deliver sued for the difference between the contract price and the then market price. "But on plaintiff's own theory," said the court, "it is manifest that the agreement is a *nudum pactum*. We scan its provisions in vain to find the imposition on Campbell of any obligation to take or pay for any amount of coal whatever. He undertakes nothing, except to pay at the end of each month for such coal as he may have chosen to order. One promise may be a good consideration for another promise, but not 'unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.' 1 Pars. Cont. 448. Thus it has been held that a written agreement to give A the refusal of a lease of a farm at a stipulated rent, with no agreement on the part of A to take it, and no other consideration, is void. Burnet v. Bisco, 4 Johns. 235. So a contract in writing to convey lands at a fixed price and within a stated time, where the other party did not himself take and nothing was paid or agreed to to be paid by him, was held void. Bean v. Burbank, 16 Me. 458. Again, where the purchaser at an execution sale gave the defendant a written promise to reconvey upon the payment of a specified sum by a day named, but the defendant did not bind himself to make such payment, the promise was held to be without consideration. Mers v. Franklin, 68 Mo. 127. The following case is yet more exactly in point, viz.: It was held that a written agreement under which one party was to deliver to the other prairie hay 'not to exceed two hundred tons,' payment to be made on delivery of designated instalments, did not confer upon the latter party a right to enforce delivery to the limit mentioned; was therefore without complete mutuality, and left it optional with each party to avoid the agreement on giving notice to the other at any period during the time of delivery. Houston, etc. Co. v. Mitchell, 38 Tex. 85. If the con-

parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order which was filled; then made another, which was declined; and on suit brought the defendant

dition upon which defendant's promise was to take effect had been the doing of something involving labor or other value by Campbell, and upon the faith of said promise, and before its revocation, Campbell had done the thing, different principles would apply, not necessary to specify here. But the foregoing cases sufficiently show that the mere exercise of an option to exact the performance of a promise does not alter the situation of the parties, and does not prevent the promisor from exercising his right of refusal. The authorities quoted are sound and applicable to our law. On these grounds we hold that defendants were not bound in law to execute the naked promise contained in their agreement, but had the right at any time to refuse to proceed in execution thereof, and for such refusal are not responsible in damages to plaintiff."

In Thayer v. Burchard, 99 Mass. 508, A wrote to B, a common carrier over one of two routes from the west, that he was about to buy grain in the west and wished to hear soon if B was disposed to contract for its transportation, as he should buy in a different market for B's route than for the other. B, in reply, stated his rates for carrying flour from the end of a canal to several towns. A then wrote asking whether the rates applied to grain as well as flour, and whether B would abate a discrimination in them against A's town. B answered that he would carry A's flour and grain from the canal to that town at a given rate "to continue in force till close of navigation unless notice to contrary." A replied the same day accepting the proposal. *Held*, that to ascertain the terms of the agreement, regard was to be had to the whole correspondence, and not the two last letters only. *Held*, also, that, by the terms so ascertained, the relation of the parties was in the nature of an open proposition by B, to which A might from time to time give effect as a contract by delivering flour and grain and calling for its transportation, and B's right to end which by notice was unqualified. *Held*, further, that after giving A notice of a change of rates to take effect on a certain day, B's obligation to carry any of A's flour or grain at the former rates after that day was limited to such flour and grain as at the time of the notice had been delivered to B by A for transportation.

In Bailey v. Austrian, 19 Minn. 535, plaintiffs being engaged in a general foundry business, defendant promised to supply them with all the Lake Superior pig iron wanted by them in their business from September 2d until December 31st next ensuing, at specified prices, and plaintiffs simultaneously promised to purchase of defendant all of said iron, which they might want in their said business during the time above mentioned, at said prices. *Held*, that this state of facts did not establish a valid contract, since it did not establish an absolute mutuality of engagement, giving each party the right to hold the

rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant; but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff; Brett, J., observing that this case 'does not decide the question whether the defendant might

other to a positive agreement. See also Tarbox v. Gotzian, 20 Minn. 139.

In Drake v. Vorse, 52 Iowa, 417, where the defendant contracted to purchase from the plaintiff, at a certain fixed price, all of the castings he should want during the year in his business, it was held that the contract did not preclude him from entering into a partnership during the year, and would not become obligatory upon the firm.

In Burton v. Great Northern Ry. Co., 9 Exch. 507, where an agent agreed to transport all the goods that might be "presented to him" for that purpose during the year, but the principal did not expressly agree to furnish any goods for transportation, it was held that the agreement was binding upon the agent only, and that the principal might at any time refuse to furnish any goods, and thus practically terminate the agency during the year without liability.

In Rhodes v. Forwood, L. R. 1 App. Cas. 256, 15 Eng. R. (Moak), 124, where the owner of coal mines appointed agents for the sale of the coal at Liverpool for seven years, but did not agree to furnish them any coal to sell during that period, it was held that the owner might sell his mines and terminate the agency, even though the seven years had not expired, without liability to the agents.

In Keller v. Ybarru, 3 Cal. 147, it was held that an undertaking by defendant "to deliver to plaintiff as many grapes as he should wish at a given price" is a mere offer, which the plaintiff had the right to accept or reject, and defendant to retract at any time before acceptance; but when the plaintiff named the quantity which he would take, the contract became complete, and both parties were bound by it.

In Chicago, etc. Ry. Co. v. Dane, 43 N. Y. 240, where the defendant offered by letter to receive from plaintiff and transport a quantity of iron not to exceed a certain number of tons, at a specified rate per ton, and the plaintiff answered merely assenting to the proposal, but did not agree on his part to deliver any iron for such transportation, it was held that there was no valid contract binding on either party.

In Bryant v. Smith, 87 Mich. 525, 49 N. W. R. 889, the plaintiffs sued defendant for the breach of an agreement which was reduced to writing but not signed, under which defendant agreed to sell and deliver, and plaintiffs to receive and pay for, five car-loads of wood at a stated price per cord. Defendant further agreed to sell and deliver to plaintiffs as much more of the same kind of wood as they should order at the same price. After delivering eight car-loads, further delivery was refused, and plaintiffs were held not to be entitled to recover.

have absolved himself from the further performance by giving notice.'"

§ 264. ——. But in a very late case in Maryland,[1] the question of the right of the promisor to absolve himself from further performance by giving notice was decided in the negative. In that case defendants had agreed to sell and deliver to the plaintiffs during the month of September from three hundred to five hundred tons of acid phosphate. The phosphate was to be "filled into buyers' bags and delivered to buyers' drays in sellers' factory." Plaintiffs were "to give ample notice of their wants twenty-four hours ahead" and were to pay cash on delivery. Three hundred tons were delivered and paid for in cash on delivery. The defendants then informed the plaintiffs that they would decline to deliver any more. Plaintiffs denied their right so to decline, and on the 22d of September notified defendants of their desire to take the remaining two hundred tons and requested the delivery thereof. Defendants refused to deliver, and suit was brought to recover damages for the breach of the contract. Said the court: "The plaintiffs had an option to make a demand for the delivery of the remaining two hundred tons of phosphate or any portion of it. The plaintiffs were not bound to make a demand for delivery, but if they did so, the defendant had agreed to deliver the article. It seems to be a settled principle that an agreement may be so framed as to leave one party an option, and thus impose no obligation on the other party until the option is exercised so as to create an obligation.[2] In contracts of this nature, when one party has an option, and gives notice that he has exercised it, the effect of such notice is to impose on the other party a binding obligation enforceable at law."[3] As to the effect of the notice of withdrawal of the offer, which was of the essence of the case, the court dispose of it by adopting the rule laid down by the

[1] Dambmann v. Rittler, 70 Md. 380, 14 Am. St. R. 364, 17 Atl. R. 389.

[2] Citing 2 Parsons on Contracts. 657; Wolf v. Willetts, 35 Ill. 88; Jenkins v. Green, 27 Beav. 437.

[3] "Such is clearly the doctrine as expounded by Parke, J., in Chippendale v. Thurston, 4 Car. & P. 101."

United States supreme court,[1] that "the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance.

[1] In Wheeler v. New Brunswick, etc. R. R. Co., 115 U. S. 29.

In National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, where it was urged that there was no mutuality, the court said: "The undertaking, here, was substantially this: Appellant agreed to deliver in car, at Sterling, Illinois, all the iron that appellee needed in its business during the then ensuing year, at $22.35 per ton. Appellee, on its part, agreed to take its year's supply of iron of the appellant, and pay for the same $22.35 per ton. We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but, on the contrary, a reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year,— that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual. A foundry may purchase its supply of coal for the season, of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter, at a specified price. Such contracts are not uncommon, and we have never understood that they were void. Smith v. Morse, 20 La. Ann. 220, is a case in point. In this case Smith agreed to furnish Morse all the ice he might require for the use of his hotel for five years, at a certain price. Smith undertook to avoid the contract, on the ground that Morse was not bound, but the court held the contract valid and binding on both parties."

In Lee Silver Mining Co. v. Omaha, etc. Smelting Co., 16 Colo. 118, 26 Pac. R. 326, the smelting company addressed a letter to the mining company saying: "For a period of six months from date we offer for the product of the Robert E. Lee mine as follows: Up to 75 ounces per ton, will pay 92 per cent. of New York quotations; 76 to 150 ounces silver per ton, 93½ per cent. of New York quotations; 151 to 250 ounces silver per ton, 94 per cent. of New York quotations; 251 ounces up, sil-

. . . On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it." This process of reasoning seems very

ver per ton, 95 per cent. of New York quotations. Deducting seventeen dollars and fifty cents ($17.50) per ton for working charges. Price of silver based on New York quotations on day of settlement. Yours truly, Omaha and Grant S. & R. Co. By Henry Head. This letter was also signed by the mining company as evidence of its acceptance. The mining company delivered to the smelting company all its product for a number of months, when it leased its mines to a stranger, who refused to deliver any more ore to the smelting company. In an action by the latter to recover damages, it was urged that there was no mutuality in the contract, but the court held otherwise, saying: "An almost parallel case to the one under consideration, in many respects, was Riggins v. Railroad Co., 73 Mo. 598, growing out of the following memorandum: 'Kansas City, Mo., November 6, 1872. Lead from Baxter to St. Louis at 22½ per 100. All lead shipped by Chapman & Riggins to be forwarded by M. R. F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates guaranteed for same time. H. J. Hayden, G. F. A., Riggins and Chapman,' — the breach alleged being that the railroad company refused to transport large quantities of lead offered by plaintiff at the rates mentioned in the proposition. The same defenses were interposed that are here insisted upon in argument, and it was held that, although Riggins & Chapman did not agree to ship any definite quantity of lead, they did bind themselves to ship over the road of the company any lead they should ship to St. Louis, and that that was a sufficient consideration for the company's guaranty of rates."

In Cherry v. Smith, 3 Humph. (Tenn.) 19, 39 Am. Dec. 150, Smith signed a paper stating: "We agree to ship and forward to D. Cherry . . . a number of barrels of salt, not to exceed one hundred and fifty, when called on, at the rate of fifty cents a bushel. . . ." In an action by Cherry against Smith for a refusal to deliver the salt, it was urged that the paper was not a contract, and if it was there was no mutuality. But the court said: "As to the first point, we think the paper contains an undertaking on the part of the defendants. They say: 'We agree to ship and forward,' etc., thereby obliging themselves to perform what they thus agree to do. As to the second point, we think there is mutuality in this contract. The fact that the agreement is optional as to one of the parties, and obligatory as to the other, does not destroy its mutuality. If there be a sufficient consideration on both sides it is mutual. Disborough v. Neilson, 3 Johns. Cas. 81; Giles v. Bradley, 2 id. 253; Penniman v. Hartshorn, 13 Mass. 91. The stipulation here is, by the one party, that they will deliver the salt when called on, and by the other that he will pay for the salt so delivered at fifty cents per bushel.

much like *petitio principii*, inasmuch as it appears to assume that a contract as to the two hundred tons existed between the parties, when this was the very question at issue.

Much conflict of authority exists, as will be seen from the cases cited in the notes.

This constitutes the mutuality. These promises, the one in consideration of the other, are sufficient to make the contract binding. The agreement on the part of Cherry is to pay for the salt at the rate of fifty cents per bushel, and he cannot claim the performance of the engagement on the part of the defendants, unless he is ready to fulfill his own as set out in the contract. It cannot, therefore, be regarded as a naked undertaking by one party only; for mutual executory undertakings constitute a sufficient consideration. Disborough v. Neilson, 3 Johns. Cas. 81."

In Kaufman Bros. & Co. v. Farley Mfg. Co., 78 Iowa, 679, 43 N. W. R. 612, 16 Am. St. R. 462, it was held that "a contract to furnish a vendee with a certain line of goods for sale in a specified district, with a provision that the goods shall be sent him as he orders them, and as long as he has sale for them, is an agreement on the part of the vendor to furnish the goods as ordered by the vendee, and not only to fill orders taken by him; nor can the vendor terminate the contract at pleasure."

In Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. R. 39, it was held that "where carriage manufacturers make an order for whatever wheels they may want during a specified season, at prices stated in the order, which is accepted by the orderee, the order and acceptance, when supplemented by the filling of one or more orders for wheels, become a valid and binding contract for the entire season."

In Sheffield Furnace Co. v. Hull Coal Co., 101 Ala. 446, 14 S. R. 672, it was held that "where an agreement in writing evidences a sale and purchase of a certain quantity of coke at a specified price, provided the seller is able to induce coke manufacturers to build ovens and make a certain portion of the stipulated amount of coke, and provides for notice by the seller at various times mentioned as to how much of the entire quantity of coke can be supplied during certain specified periods, and recites that the conditions of sale, binding the buyer to take the coke as specified and giving the seller the option to furnish it, are entered into to enable the seller to induce the manufacturers to build sufficient ovens by promising a certain sale of their product at a fixed price, the seller obligating himself to use his best endeavor to accomplish this end, though at the time made such agreement was unilateral, imposing no enforceable obligation on the seller, and therefore not binding on the buyer, when the seller induces the manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, the unilateral agreement is converted from a conditional and optional one into a mutually binding contract, imposing mutually enforceable obligations on the parties thereto, for the breach of which suit can be maintained."

III.

Of Mistakes in Making the Contract.

§ 265. Mistakes of parties in making the contract.— In order that there may be a contract between the parties it is evident that the parties must agree — they must, as it is so often said, assent to the same thing in the same sense. In a particular case, however, it may be found that, owing to the mistake, misapprehension or ignorance of one or both of the parties, they have not agreed, although, perhaps, they thought they had; and some attention must now be given to the effect which a mistake may have upon the formation of the contract, although its general effect upon the repudiation of the contract will be considered later.[1]

In Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. R. 774, 31 L. R. A. 529, it was held that "a contract for its 'requirements' of coal for a certain season, made by a lumber company, is not void for uncertainty and for want of mutuality, where it is evidently meant to call for the amount of coal which the corporation should need in its business for such season, and not merely what it might choose to require of the other party."

In Wells v. Alexandre, 130 N. Y. 642, 29 N. E. R. 142, 15 L. R. A. 218, it was held that "1. The acceptance of an offer to furnish coal for a year at a certain price to three steamers named, which are then employed on a certain steamship line, makes a definite and binding contract for the amount of coal required to supply them for one year in their ordinary employment. 2. If a notice that coal is needed is requisite to the execution of a contract to supply certain steamers with coal for one year, a covenant to give such notice will be inferred. 3. The sale of steamers after making a contract for the supply of coal to them for one year will not relieve them from the obligation to take the coal which their ordinary and accustomed use required."

In Walsh v. Myers, 92 Wis. 397, 66 N. W. R. 250, the court said: "By a written contract defendants agreed to take plaintiff's entire output of lye cans, and he was to continue to furnish them as theretofore their 'entire wants for cans,' which were to be not less than ten thousand cans per day. They agreed to keep him supplied with ample material so as to keep his force constantly employed, and the contract was 'to continue in force as long as [the defendants] use lye cans.' *Held*, that the contract was not void for want of mutuality." See further, Michigan Stove Co. v. Harris, 81 Fed. R. 928, 27 C. C. A. 6, 54 U. S. App. 137; Shadbolt, etc. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. R. 854; Carter White Lead Co. v. Kinlin, 47 Neb. 409, 66 N. W. R. 536; Staples v. O'Neal, 64 Minn. 27, 65 N. W. R. 1083.

[1] See *post*, §§ 830–844 (Avoidance of Contract for Mistake).

The mistakes which parties may make are, of course, very numerous; but they will, in the main, fall under one of the following heads:

1. Mistake as to the *nature* of the transaction.
2. Mistake as to the *parties* to the transaction.
3. Mistake as to the *subject-matter* of the transaction.
4. Mistake as to the *terms* of the transaction.
5. Mistake as to the *possibility* of performance.

Each of these will be briefly considered.

§ 266. Mistake as to the nature of the transaction.— In general, if the parties are mistaken as to the nature of the transaction, no contract of sale is made. If through ignorance or inadvertence, while intending to make a contract of sale they make a contract which in legal effect is a lease, there clearly is no sale and the lease may be avoided. If A says to B, "I will *sell* you this property for $1,000," and B replies, "I accept your offer to *lease* me this property for $1,000," there is clearly no agreement.

So if A, through the fraud of B or a third person, is induced to make a contract of sale when he supposed he was making a contract of lease, he is not bound,[1] in the absence of negligence or of facts creating an estoppel, even to a *bona fide* holder.[2]

So, also, if A, intending to make a contract of lease to B, as B knows — that being the effect of their negotiation — makes what is in legal effect a contract of sale, as B knows but A does not, A is not bound. But if A makes what is in legal effect a contract of sale to B, when B, who has acted in good faith, expects a contract of sale and supposes that A intends

[1] See Throughgood's Case, 2 Co. R. 9.

[2] See Foster v. Mackinnon (1869), L. R. 4 C. P. 711. Of course, if a party can read, but does not, and no artifice or fraud is practiced [as to which, see Moore v. Copp (1897), 119 Cal. 429, 51 Pac. R. 630], he is bound by the contract he signs. Black v. Wabash Ry. Co. (1884), 111 Ill. 351; Sanger v. Dun (1879), 47 Wis. 615, 3 N. W. R. 388; Maine Mut. Ins. Co. v. Hodgkins (1876), 66 Me. 109. And so, though he cannot read, if he does not ask to have it read to him. Greenfield's Case (1850), 14 Pa. St. 489, 496; Weller's Appeal (1883), 103 Pa. St. 594.

to make a contract of sale — that being the apparent result of their negotiation,— A is bound though he may have intended a contract of lease only.

§ 267. Mistake as to identity of party.— Like results may also flow from a mistake as to the identity of one of the parties to the contract. As is said in a recent case,[1] "every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman,[2] 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.'" If, therefore, at the time of making the contract, one of the parties supposed the other to be another than he was, as the latter knew or had reason to believe, there is a mistake as to a material fact and hence no sale.[3] Thus if A orders goods of B, C, though he is B's successor in business, cannot fill the order without A's consent, and if he does A is not bound.[4] But

[1] Mr. Justice Gray, in Arkansas Smelting Co. v. Belden Mining Co., 127 U. S. 379, citing Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am. Dec. 93; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. R. 9; King v. Batterson, 13 R. I. 117, 120, 43 Am. R. 13; Lansden v. McCarthy, 45 Mo. 106.

[2] In Humble v. Hunter, *supra*.

[3] Where the vendor in an executory contract for the future sale and delivery of ice is led to believe by the person who negotiates the contract on behalf of the vendee that he is acting for a particular firm, when he really was acting for a corporation of the same name, of the existence of which the vendor was ignorant, "there was no contract, and in case ice had been delivered under it without knowledge of the facts, title to the ice would not have passed to the plaintiff." Consumers' Ice Co. v. Webster (1898), 32 N. Y. App. Div. 592.

[4] Boulton v. Jones, 2 Hurl. & Nor. 564, furnishes an illustration of the principle. There the defendants, who had been in the habit of dealing with B., sent a written order for goods directed to B. The plaintiff, who on the same day had bought B.'s business, filled the order without giving the defendants any notice that the goods were not supplied to B. Upon the plaintiff's rendering his account to defendants they disclaimed all transactions with him and he brought an action for the price of the goods, but was held not to be entitled to recover. Martin, B., said: "This is not a case of principal and agent. If there was any contract at all, it was not with the plaintiff. If a man goes to a shop and makes a contract, intending it to be with one particular person, no other person can convert

where A begins negotiations for a purchase with B, supposing that he is dealing with C, but before the negotiations are completed is informed of the mistake and completes the purchase, he is bound and cannot afterwards set up the mistake to defeat

that into a contract with him." To like effect: Randolph Iron Co. v. Elliott (1869), 34 N. J. L. 184.

Lansden v. McCarty, 45 Mo. 106, is also to the same effect. There defendant had entered into a contract with B. & K. to supply their hotel with meat for a period of one year at a certain rate per pound, payment to be made at the expiration of each month for the meat furnished during that month. During the year B. & K. sold out to plaintiff and assigned to him their meat contract with defendant. Plaintiff notified defendant of the assignment and demanded the further performance of the contract to himself, offering upon his part to perform all of the covenants of his assignors. The defendant refused to continue to furnish the meat and the plaintiff brought an action against him, but was not permitted to recover. "The defendant," said the court, "may have been willing to deliver his meats in advance of payment by reason of the confidence he reposed in the credit and solvency of the parties with whom he originally contracted. The readiness and offer of the plaintiffs to pledge themselves to a faithful performance of the stipulations of the contract obligatory upon their assignors is not to the purpose. It does not meet the exigency of the case. The question presented was one of personal trust and confidence, which it was the right of the defendant to decide for himself."

Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. R. 9, furnishes another illustration. Here the defendant had made a contract with the Citizens' Ice Co. to supply him with ice. Without his knowledge the Citizens' Ice Co. sold its business to the plaintiff, with the privilege of supplying ice to all its customers, and the plaintiff furnished ice to the defendant's house for more than a year before he was notified of the change. Defendant had formerly purchased ice of the plaintiff company, but had been dissatisfied with its performance and had terminated his contract with the plaintiff at the time of making the contract with the Citizens' Ice Co. Plaintiff sued to recover for the ice so furnished, but it was held that it had no cause of action. Endicott, J., said: "A party has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or quality of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Co. could no longer perform its contract with him,

his liability.[1] A sale would not be void, however, but voidable merely, where goods are actually sold to A, though the sale was procured by his false representation that he is B.[2]

§ 268. —— Undisclosed principal.— So "it is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal."[3] But the

it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered, a contract would be implied."

Arkansas Smelting Co. v. Belden Mining Co., 127 U. S. 379, furnishes a late illustration of the rule. In this case defendant had contracted with Billing & Eilers to furnish to them at their smelting works ten thousand tons of lead ore in certain amounts daily, upon the understanding that the ore should, upon delivery, become the property of Billing & Eilers, and should afterwards be paid for at current New York quotations, in one hundred-ton lots, according to an assay of each lot, with a further provision for arbitration in case the parties could not agree upon the assay. After part of the ore had been delivered, Billing & Eilers dissolved partnership, and all rights in the business and in the contract for ore were transferred to Billing, and defendant continued, after notice of the dissolution, to furnish ore to him under the contract. Soon afterwards, and while nearly nine thousand tons remained undelivered. Billing sold all of his interest in the works and in the ore contract to the plaintiff company, of which sale defendant had notice. Thereupon defendant ceased to deliver ore under the contract, and gave plaintiff notice that it considered the contract canceled and annulled. Plaintiff, alleging its ability and willingness to carry out the contract on its part, brought an action for damages. The circuit court sustained a demurrer to the complaint, and upon appeal to the United States Supreme Court the judgment was affirmed. "During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price," said Mr. Justice Gray, "the defendant has no security for its payment except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted."

[1] Mudge v. Oliver, 1 Allen (Mass.), 74.

[2] Edmunds v. Merchants' Desp. Transp. Co., 135 Mass. 283.

[3] Huntington v. Knox, 7 Cush. (Mass.) 371; Winchester v. Howard,

other party may expressly exclude negotiations with the principal and confine them to the agent personally, and where he does so the principal cannot intervene.[1] So, on the other hand, where one is really buying goods for himself, the seller cannot hold a third person responsible who subsequently buys the goods from the first purchaser because he supposed that the latter was only the agent of such third person.[2]

§ 269. —— **Assumed agent.**— Where an assumed agent has no authority to bind and does not bind his alleged principal, there is, of course, no sale.[3] Neither is there any sale where one, by falsely representing himself to be the agent of a named or an unnamed principal, procures goods on the credit of such principal;[4] and the vendor may maintain replevin for his goods or recover their value in trover even from the *bona fide* pledgee[5]

97 Mass. 303, 93 Am. Dec. 93. This would, of course, be subject to defenses against the agent. See Mechem on Agency, § 773; Baxter v. Sherman (1898), 73 Minn. 434, 76 N. W. R. 211, 72 Am. St. R. 631; Belfield v. National Supply Co. (1899), 189 Pa. St. 189, 42 Atl. R. 131, 69 Am. St. R. 799.

[1] Winchester v. Howard, *supra*.

[2] Stoddard v. Ham, 129 Mass. 383, 37 Am. R. 369, distinguishing Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. R. 9; Hardman v. Booth, 1 H. & C. 803; and Mitchell v. La Page, Holt's N. P. 253.

[3] J. S., who pretended to represent B. & Co., called upon D. and contracted with him for wool to be consigned to B. & Co. at Pittsburgh, to be paid for when D. should call. J. S. also called upon B. & Co., pretended to be the son of D., and contracted to sell them wool. The wool was shipped by D., consigned to B. & Co., but was received by J. S., who delivered it to B. & Co. and received the pay for it. In an action of replevin by D. against B. & Co. it was held that D.'s title was not divested and that he could recover. Barker v. Dinsmore (1872), 72 Pa. St. 427, 13 Am. R. 697. Compare with McGoldrick v. Willits (1873), 52 N. Y. 612.

[4] If A., representing himself to be a brother of a reputable merchant, buying for him, buys, in person, goods of another, the property in the goods does not pass to A., and the seller may recover them from a carrier to whom A. has delivered them for carriage. Aborn v. Merchants' Despatch Transportation Co., 135 Mass. 283.

[5] The plaintiff refusing to sell goods to C., a broker, delivered them to him on his representation that they were for an undisclosed principal in good credit, and entered and billed them as on a sale to C. It turning out that there was no such principal, *held*, that the plaintiff might maintain replevin for the goods from the defendant, who was C.'s *bona fide* pledgee. Rodliff v. Dallinger, 141 Mass. 1, 55 Am. R. 439. "It was ad-

or vendee[1] of the assumed agent, there being not even a *de facto* contract between the latter and the true owner.

§ 270. Mistake regarding the thing sold.— Failure to contract may also result from mistake regarding the thing sold. This mistake may be that of both parties or of one only; and it may be respecting its existence, location or character. Somewhat different results may follow in these several cases.

§ 271. —— Existence of thing sold.— If, contrary to the belief of both parties, the thing contracted for never had any existence, or it had ceased to exist, as if the horse supposed to be alive in the vendor's stable had suddenly died before the

mitted," said the court, "that Clementson (C.) in fact was not acting for such an undisclosed principal; and it follows that if the plaintiff's evidence was believed there was no sale. There could not be one to this supposed principal, because there was no such person, and there was not one to Clementson, because none purported to be made to him, but, on the contrary, such a sale was expressly refused and excluded." Citing Edmunds v. Merchants' Despatch Transportation Co., 135 Mass. 283.

[1] H., relying on the representations of R. that he was the agent of L. & Co., agreed to sell goods to L. & Co. on credit, delivered them to L. & Co. and received part of the price from R. R. was not the agent of L. & Co., and had no authority to purchase for L. & Co., and the latter bought the goods from R., without any knowledge of the fraud R. was practicing on H. *Held*, that the title did not pass and that H. could recover their value from L. & Co. less the amount paid by R. Hamet v. Letcher, 37 Ohio St. 356, 41 Am. R. 519. Said the court: "This, therefore, was not a contract voidable merely, but an agreement wholly void; and under the circumstances the property in the hogs never passed from Hamet. Hence, applying the maxim that no one can transfer a greater right or better title than he himself possesses (Roland v. Gundy, 5 Ohio, 202), it necessarily follows that Letcher & Co. are liable as for a conversion." Citing Moody v. Blake, 117 Mass. 23; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. R. 697; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Fawcett v. Osborn, 32 Ill. 411; Hardman v. Booth, 1 H. & C. 803; Higgons v. Burton, 26 L. J. Ex. 342; Kingsford v. Merry, 1 H. & N. 503; Hollins v. Fowler, L. R. 7 Q. B. 616; affirmed, L. R. 7 H. L. 757; In re Reed, 3 Ch. Div. 123; Lickbarrow v. Mason, 1 Smith L. C. 388; Cundy v. Lindsay, L. R. 3 App. Cas. 459. Stoddard v. Ham, 129 Mass. 383, 37 Am. R. 369; Dean v. Yates, 22 Ohio St. 388, and Sanders v. Keber, 28 Ohio St. 630, were also cited and reconciled.

negotiations were completed, there would clearly be no sale,[1] as both parties contemplate the sale of a living and not a dead horse. The same result would doubtless ensue if one of the parties had secret knowledge of the death which he concealed from the other.

§ 272. —— **Identity of thing sold.**— No contract of sale obviously can result if the parties are not agreed as to the identity of the thing sold. If A says to B: "I will sell you my black horse for one hundred dollars;" and B replies: "I accept your offer to sell me your white horse for one hundred dollars," there is clearly no agreement; and though the negotiations may not take this simple and specific form, if A supposes he is selling one thing while B supposes he is buying another, no sale results.[2]

[1] See Thomas v. Knowles (1879), 128 Mass. 22.

[2] Kyle v. Kavanagh (1869), 103 Mass. 356, 4 Am. R. 560: Stong v. Lane (1896), 66 Minn. 94, 68 N. W. R. 765.

Where a certain number of barrels of No. 1 mackerel are sold, and by mistake some barrels of No. 3 mackerel and some barrels of salt are delivered, no title to the articles thus delivered by mistake passes to the purchaser. Gardner v. Lane, 9 Allen, 492, 85 Am. Dec. 779. The delivery of a ten-dollar gold piece by mistake instead of a fifty-cent piece conveys no title to the gold piece. Chapman v. Cole, 12 Gray (Mass.), 141, 71 Am. Dec. 739.

Damaged flour was offered for sale at auction, divided into two classes. One class, slightly damaged, was offered by the barrel, in the barrels in which it was originally packed. The other, much damaged, had been repacked, and was offered by the pound as repacked flour or "dough." The sale took place in an auction room; the flour was in the street outside. After the auctioneer had sold, as he thought, all of the first class, he offered for sale the second class, stating the difference between the two classes. The plaintiff, who was the highest bidder, selected by their numbers two rows of barrels as the flour he would take. These rows were made up of barrels of flour of the first class, accidentally misplaced without the knowledge of the owner or auctioneer. *Held*, there had been no sale, as the minds of the parties had not met as to the subject-matter of the sale. Harvey v. Harris, 112 Mass. 32. The purchaser at an auction sale by catalogue, wherein the parcels are numbered, is entitled upon his bid only to the parcel put up by the auctioneer by its number, though through mistake a parcel of another number is exhibited to the bidders. Where the auctioneer put up for sale parcel No. 24 and C. bid thereon, supposing No. 25 to be offered, and the parcel was struck off to him, *held*, that neither parcel was sold, but the

§ 273. —— Unknown article contained or concealed in thing sold.— Allied to the cases considered in the preceding section are those in which the thing sold contains or has attached to or concealed in it some article of whose presence the vendor was ignorant. Thus the sale of a coat passes no title to a pocket-book which may happen to be temporarily deposited therein; the sale of a safe or a chest of drawers passes no title to the deposits contained therein; and the sale of a machine conveys no title to money and valuables which the former owner had concealed within it.[1]

§ 274. —— Mistake as to quantity.— Mistakes as to quantity may readily occur. If the quantity is open to inspection, one party could not ordinarily escape, in the absence of artifice,

title to each remained unchanged. Sheldon v. Capron, 3 R. I. 171.

A sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell St. Petersburg hemp, and by the buyer to purchase Riga Rhine hemp, a superior article. The broker had made a mistake in describing the hemp to the buyer, and the court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale. Thornton v. Kempster, 5 Taunt. 786.

A contract was made for the sale of "one hundred and twenty-five bales of Surat cotton, guaranteed middling fair merchants' Dhollerah, to arrive *ex* Peerless from Bombay," and the defendant pleaded to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship Peerless, which sailed from Bombay in October, not that which arrived in a ship Peerless that sailed in December, the latter being the cotton that plaintiff had offered to deliver. On demurrer, *held*, that on this state of facts there was no *consensus ad idem*, no contract at all between the parties. Raffles v. Wichelhaus, 2 H. & C. 906.

[1] Huthmacher v. Harris, 38 Pa. St. 491, 80 Am. Dec. 502; Durfee v. Jones, 11 R. I. 588, 23 Am. R. 528; Merry v. Green, 7 Mees. & W. 623; Bowen v. Sullivan, 62 Ind. 281, 30 Am. R. 172; Ray v. Light, 34 Ark. 421.

The owner of a tannery sold it, and accidentally omitted to remove a few hides from the vats. More than twenty years afterwards a laborer, working for a subsequent grantee, found them. *Held*, that he got no title to them, as they were neither lost, abandoned, derelict nor treasure trove, but belonged to the original owner or his representatives. Livermore v. White, 74 Me. 452, 43 Am. R. 600.

A bought an old safe, and afterwards offered to sell it to B, who declined to purchase. It was then left with B to sell, with the privilege of using it until sold. B found secreted in it a roll of bills belonging to some

contrivance or unequal footing, because the quantity was different from what he supposed it to be. But if both parties were alike mistaken,[1] or if the quantity was not open to inspection and one party is in error as to the quantity proposed, there is no meeting of the minds.[2]

person unknown, whereupon A demanded the money and also the safe and its contents as when B received it. B returned the safe but kept the money. *Held*, as between A and B, that B was entitled to retain the money as finder, it being conceded that A by his purchase of the safe acquired no title to the money. Durfee v. Jones, 11 R. I. 588, 23 Am. R. 528.

A girl assorting paper rags in a paper mill found a number of bank bills in a clean, unmarked envelope, among the rags. *Held*, that as against the proprietor of the mills she was entitled to them, as finder, the purchase of the rags not carrying with it the title to the bills. Bowen v. Sullivan, 62 Ind. 281, 30 Am. R. 172.

[1] In Wheadon v. Olds (1838), 20 Wend. (N. Y.) 174, the contract was for the sale of a quantity of oats supposed to contain from one thousand six hundred to two thousand bushels. The oats were to be delivered from a storehouse into a canal boat; as the delivery proceeded tallies were kept, and after the tallies amounted to five hundred, it was proposed to guess at the whole quantity by comparing the amount gone into the boat with that yet remaining, and it was finally agreed that there were one thousand nine hundred bushels, for which amount the buyer paid. Afterwards when the oats were measured out there were found to be but one thousand four hundred and eighty-eight bushels, and then it was discovered that both parties were in error as to the tallies: they were of half bushels, instead of bushels, as the parties supposed. It appeared also that the buyer had said, while they were agreeing upon the quantity, that he would take the oats at one thousand nine hundred bushels, "hit or miss;" but it was held that there was such mistake that the buyer could recover for the difference between the actual and the estimated quantity. So, where the parties were negotiating for the sale of a ton of hay, and, to avoid the trouble of weighing it, measured at a rate which they mistakenly estimated would constitute a ton, but which really made but little more than half a ton, it was held that there was such mistake as to justify a recovery of the excess in prices paid. Scott v. Warner (1870), 2 Lans. (N. Y.) 49. And to the same effect is Cox v. Prentice (1815), 3 Maule & Sel. 344, where the parties sold a bar of silver and paid for it on the basis of the assayer's estimate, which was proved to be incorrect.

[2] In Hartford & N. H. R. Co. v. Jackson (1856), 24 Conn. 514, 63 Am. Dec. 177, it appeared that defendants applied to the agent of the carrier for a rate for transportation of a quantity of laths. The agent asked how many there would be. Defendants turned to a companion, who said he thought there would be five hundred bundles. The agent claimed

On the other hand, where one submits a plain and unambiguous order for goods to a manufacturer which is accepted, the person ordering cannot be relieved because he ordered more goods than he thought he was ordering.[1]

§ 275. —— Mistake as to kind, quality or character.— Mistakes as to kind, quality or character are not so easily disposed of. A mistake as to kind may be so great as really to amount to a mistake as to identity; and, if it is the mistake of both parties, will prevent agreement, and if the mistake of one, going to the substance of the contract, will justify him in refusing to execute the attempted agreement, or in repudiating it if executed.

that he understood him to say one hundred bundles, and made a rate for that quantity. When the laths were delivered to the carrier the agent discovered the mistake, and tried to communicate with the defendants, but did not succeed in finding them. He therefore forwarded the whole quantity, and the action was to recover the usual rate of surplus. *Held*, that if the parties did not assent to the same thing in the same sense, there was no contract, and that whether they did so assent was a question of fact for the jury.

[1] In Coates v. Early (1895), 46 S. C. 220, 24 S. E. R. 305, it appeared that Coates & Sons had solicited from Early an order for "needle-cards." They sent him a sample card and a printed blank for the order. Each needle-card contained thirty-two needles. Early filled out an order on the blank for five thousand needle-cards as described, with his advertisement printed on each card. The needle-cards were duly supplied, printed as directed, but Early refused to receive them because, as he contended, he thought he was ordering five thousand needles, and not five thousand cards of thirty-two needles each. But the court held that as the order was clear and unambiguous, and as the plaintiffs were in no way responsible for the mistake or conscious of it, Early was bound.

Avoidance of contract for mistake.— In Sherwood v. Walker, 66 Mich. 568, 11 Am. St. R. 531, Morse, J., says: "It must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual." Citing Benjamin on Sale, secs. 605, 606; Leake on Contracts, 339; Story on Sales (4th ed.), secs. 148, 377; Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen (Mass.), 492, 85 Am. Dec. 779, 12 Allen, 44; Huthmacher v. Harris,

But, in order that the mistake of one party shall have this effect, it must be a mistake as to a fact which is of the very essence of the contract, and not as to some collateral thing which does not affect the substance of the whole consideration. As is said in a late case,[1] "the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold." In another case[2] the rule is stated thus: "If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding." "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."[3]

§ 276. ——. On the ground that there was such an essential mistake in regard to the kind of article dealt with, it was held that, where both parties believed a cow contracted for was not a breeder, and was therefore valuable only for beef, when in fact she was a breeder and really worth ten to twelve times the price agreed upon, the seller might repudiate the contract and refuse to surrender the cow.[4] So it is a material mistake

38 Pa. St. 491, 80 Am. Dec. 502; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380; Allen v. Hammond, 11 Pet. (U. S.) 63.

[1] Hecht v. Batcheller, 147 Mass. 335, 9 Am. St. R. 708, citing Gardner v. Lane, *supra;* Spurr v. Benedict, 99 Mass. 463; Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433.

[2] Sherwood v. Walker, 66 Mich. 568, 11 Am. St. R. 531.

[3] Kennedy v. Panama, etc. Mail Co., L. R. 2 Q. B. 580, 588.

[4] Sherwood v. Walker (1887), 66 Mich. 568, 33 N. W. R. 919, 11 Am. St. R. 531. "It seems to me," said Morse, J., writing for the majority of the court, "that the mistake or

where the parties deal upon the understanding that the seller has the title to the goods and may lawfully convey it, whereas in fact he had no title.[1]

Upon the other hand, it was held that there was no such mistake as would defeat the contract where, without any fraud or unfairness, a woman sold to a jeweler for $1 a stone which both supposed to be a topaz or some other curious specimen, but which proved to be a diamond worth $1,000.[2] Nor

misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it ought have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow and a valuable one."

In Newell v. Smith (1885), 53 Conn. 72, plaintiff had sold defendant a cow for which he was to pay $100 if she was with calf, and $40 if she was not. Six months later, both parties concluded that she was not with calf, and settled on that basis. She proved to be with calf, and it was held that plaintiff could recover the remaining $60.

[1] Varnum v. Highgate (1892), 65 Vt. 416, 26 Atl. R. 628.

[2] Wood v. Boynton (1885), 64 Wis. 265, 25 N. W. R. 42, 54 Am. R. 610.

So a contract for the sale of a horse known by both parties to be sick, but no warranty being given, cannot be afterwards repudiated because the purchasers discover that the horse is sicker than they thought it was. "Such an error or mistake as that in no manner affects the validity of the contract. In a case where there is a mutual mistake of the parties as to the subject-matter of the contract, or the price or terms, going to show the want of a *consensus ad idem*,

is there where a promissory note was sold, both parties supposing the makers to be doing business as usual, though in fact the makers, two hours before the sale, had made a general assignment of all their property for the benefit of creditors.[1]

§ 277. —— Mistake as to location.— A mistake as to the location of the property may be so material, within the mean-

without which no contract can arise, such a defense may be made. But here the mistake of the defendants was in relation to a fact wholly collateral, and not affecting the essence of the contract itself. The vendees cannot escape from the obligation of their contract because they have been mistaken or disappointed in the quality of the article purchased. In the absence of a warranty the principle of *caveat emptor* applies, and the buyer takes the risk of quality upon himself." Wheat v. Cross (1869), 31 Md. 99, 1 Am. R. 28.

[1] Hecht v. Batcheller (1888), 147 Mass. 335, 17 N. E. R. 651, 9 Am. St. R. 708. "The note delivered," said the court, "was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and not its identity. . . . The makers of the note had made an assignment for the benefit of their creditors, but this did not extinguish the note or destroy its identity. It remained an existing note, capable of being enforced with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality."

The same result was reached in Sample v. Bridgforth (1894), 72 Miss. 293, 16 S. R. 876, where the parties to the sale and purchase of a note mistakenly supposed it was secured by a first mortgage, but this was held to be a mistake as to a collateral point which affected value only and not identity.

But where one sells promissory notes at less than their face, representing them to be business papers when in fact they are accommodation notes, and thus usurious and void in the hands of the vendee, the latter may rescind the contract and recover back the purchase-money although there be no fraud or warranty. Said the court: "It is a general rule that upon the sale and delivery of personal property without fraud or warranty, no action will lie against the vendor to recover damages for any defects which may exist; and this rule applies when the article differs from the representations of the seller as to quality, unless such representations were fraudulent. But when the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, and the difference in subject-matter is so substantial and essential in character as to amount to a failure of consideration, there is no contract, and the purchaser may recover back the money paid." Webb v. Odell (1872), 49 N. Y. 583.

ing of the rules just referred to, that it will prevent the formation of the contract. Thus where both parties, negotiating at Burlington, Vermont, supposed the property to be in the custody of a storekeeper at Whitehall, where the buyer desired to receive it, when in fact it had been forwarded to Boston and there commingled with the goods of a commission merchant, it was held that the mistake was so material that, if the fact had been known, the contract would not have been entered into, and therefore that no title passed.[1]

§ 278. Mistake as to terms of contract — Price.— There may also be mistake as to the terms of the contract. The mistake most commonly made, perhaps, is in reference to the price. If the parties are mutually mistaken, as where an offer of a certain price for shingles was understood by the seller to be so much per bunch and by the buyer to be so much per thousand — a material difference,— it was held that there was no contract.[2] So where one party alone is in error, but the other

[1] Ketchum v. Catlin (1849), 21 Vt. 191. "If a contract," it was said, "is made in mutual error of material facts which have induced the contract, it is invalid and may be set aside. This is upon the principle, mainly, that when the parties are under a mutual mistake as to material facts, affecting the subject-matter of the contract, there is a want of a binding assent, and we think a contract so made may be avoided in a court of law." To like effect: Bedell v. Wilder (1892), 65 Vt. 406, 26 Atl. R. 589, 36 Am. St. R. 871.

[2] Greene v. Bateman (1846), 2 Woodb. & M. 359, Fed. Cas. No. 5762.

Where the owner of a mare asked $165 for her, and the purchaser understood the price asked to be $65, and took her home with him and refused to pay more than the latter named sum, there being a clear misunderstanding between the parties, it was held that there was no sale, and consequently no title passed. Rupley v. Daggett (1874), 74 Ill. 351.

And so in Rovegno v. Defferari (1871), 40 Cal. 459, where the seller understood that he was selling at one price while the buyer understood that he was buying at a different price. To like effect, also, in Phillips v. Bistolli, 2 B. & Cr. 511, where a foreigner, not familiar with English, supposed he was buying an article at auction at forty-eight guineas while the auctioneer understood the bid to be eighty-eight guineas.

So in Hogue v. Mackey (1890), 44 Kan. 277, 24 Pac. R. 477, where one of the parties understood that the instalments of the price were to be paid at intervals of thirty days, and the other understood the interval to be ninety days, there was held to be no sale.

is aware of it and "snaps at an offer which he perfectly well knows to be made by mistake," there is no contract.[1] But where one party is in error, while the other is ignorant of it — as where a party who makes an offer has made an error in his calculations upon which the offer was based, and the other accepts in good faith and the contract is completed,— the contract cannot be defeated.[2]

§ 279. Mistake as to possibility of performance.— The general question of the effect of impossibility as an excuse for the non-performance of the contract will be considered in later sections;[3] but there may arise such aspects of it as are germane to the present discussion. It must be assumed, ordinarily, that the parties to a contract contemplate its performance, and that they believe it possible to perform it according to its terms. Hence, if, through mutual error as to facts, they stipulate for things impossible of accomplishment, or if in a contract of sale of machinery, for example, they fix a standard of performance which it is impossible to realize, "the contract which they intended to establish on that foundation falls when the foundation itself is discovered to have no existence."[4]

[1] Harran v. Foley (1885), 62 Wis. 584, 22 N. W. R. 837, where the seller intended to offer cattle for $261.50, but by slip of tongue said $161.50, and the buyer having good reason to believe that it was a mistake immediately made a payment to bind the bargain, and claimed the cattle. (Webster v. Cecil, 30 Beav. 62, and Tamplin v. James, L. R. 15 Ch. Div. 221, were cited.) To like effect; Shelton v. Ellis (1883), 70 Ga. 297.

[2] Griffin v. O'Neil (1892), 48 Kan. 117, 29 Pac. R. 143.

[3] See *post*, §§ 830–844.

[4] In Nordyke & Marmon Co. v. Kehlor (1900), 155 Mo. 643, 56 S. W. R. 287, the parties stipulated that milling machinery should be capable of producing a certain quantity of flour "fully equal in quality to the best fifty-five per cent. that Kelly & Lysle can make in their mill." Both parties supposed that the mill of Kelly & Lysle produced flour of the grade specified, but it in fact did not and could not without change. It was held that, on the discovery of the facts, the seller was justified in abandoning the undertaking.

CHAPTER VII.

OF THE CONTRACT OF SALE UNDER THE STATUTE OF FRAUDS.

§ 280. Purpose of this chapter.
281. Sales prior to the statute.

I. The Statute.

282, 283. The seventeenth section of the statute of frauds.
284. English sale of goods act.
285–290. Statutes in United States.
291. General effect of the statutes.

II. What are Contracts for the Sale of Goods, Wares and Merchandise.

292. Importance of this question.

1. *Executory Contracts.*

293. Statute applies to executory contracts.

2. *Contracts of Sale or Manufacture.*

294. Statute applies only to contracts of sale and not for manufacture.
295–297. English cases — Immediate sale as the test.
298, 299. —— Impossibility of present delivery as the test — Goods not in existence.
300. —— Work on one's own materials as the test.
301. —— Whether work or materials is the essence of the contract, as the test.
302, 303. —— The present English test.
304, 305. American cases — The rule in New York.
306, 307. —— The rule in Massachusetts.
§ 308–310. —— The rule in Vermont, Oregon, Washington and Michigan.
311–313. —— The rule in Maine and New Hampshire.
314, 315. —— The rule in Wisconsin and California.
316. —— The rule in New Jersey.
317. —— The rule in New Mexico.
318. —— The rule in Colorado.
319. —— The rule in Minnesota.
320. —— The rule in Missouri.
321, 322. —— The rule in Georgia.
323. —— The rule in Maryland.
324, 325. —— The rule in Iowa.
326. —— The true rule.

3. *Auction Sale.*

327. Auction sales within the statute.
328. Contracts of barter or exchange within the statute.

III. What are Goods, Wares and Merchandise.

329. English rule includes only corporeal movable property.
330. Rule in United States more comprehensive.
331. What included — Stocks — Notes — Inventions.
332–335. —— Fixtures.
336–339. —— Growing trees.
340–344. —— Growing crops.
345. —— Crops to be raised.
346. —— Uncut ice.
347. —— Minerals.

IV. Of the Price or Value.

§ 348. Operation of the statute.
349, 350. Sale of several articles aggregating more than the limit.
351. Sale of various articles at auction.
352. How when amount uncertain at time of sale.

V. Of Acceptance and Receipt.

353. What the statute requires.
354. Delivery, acceptance and actual receipt required.

1. *Of Delivery by the Seller.*

355. Necessity of delivery.
356. Delivery alone not enough.

2. *Of Acceptance by the Buyer.*

357. Acceptance must be shown.
358. —— Must be voluntary and unconditional.
359. —— No acceptance while awaiting test or opportunity for examination.
360, 361. Acceptance may be implied.
362. When acceptance must occur.
363. Who may accept — Agent.
364. —— Tenant in common.
365. —— Carrier.
366. —— Administrator.
367. That buyer ought to accept, not enough.
368, 370. Whether acceptance must be final and conclusive.
371. —— Acceptance of unfinished article.
372. Burden of proof as to acceptance.
373. Question for the jury.
374. Right of seller to retract before acceptance.

3. *Of Receipt by the Buyer.*

375. Necessity of receipt.
376. Nature of receipt required.
§ 377. Fact that title would have passed not enough.
378, 379. Constructive delivery and receipt.
380, 381. —— What sufficient.
382, 383. Mere words do not constitute delivery and receipt.
384, 385. Delivery and receipt where goods still remain in seller's possession.
386. —— Goods remaining in seller's possession as seller.
387, 388. Delivery and receipt where goods are in possession of third person.
389. Delivery and receipt where goods are already in possession of purchaser.
390. Delivery where seller and buyer occupy same premises.
391, 392. Receipt by common agent.
393. —— Carrier as agent to receive.
394. Acceptance and receipt may precede passing of title.
395. Receipt and acceptance may be complete though terms of contract in dispute.
396. No title passes until receipt and acceptance.
397. Question of receipt for the jury.

4. *Part of the Goods Sold.*

398. Acceptance and receipt of part of goods suffices.
399. Any part, though small, enough.
400. But it must actually be a part of the goods sold — Sample — Specimen.
401. At what time part may be accepted and received.
402. After part acceptance, loss of remainder falls on buyer.
403. Acceptance and receipt of part must be in pursuance of the contract.

5. *Earnest or Part Payment.*

a. Of Earnest.

§ 404. Earnest and part payment synonymous.
405. Thing in earnest must be actually given.
406. Must be a thing of some value.
407. Deposit with third person by way of forfeiture not enough.
408. Effect of earnest in passing the title.

b. Of Part Payment.

409. What the statute requires.
410. The amount required.
411. What may be paid.
412. —— Check.
413. —— Buyer's note.
414. —— Note of stranger.
415. —— Money already in hands of seller.
416. —— Satisfaction of previous debt.
417. —— Payment of seller's debt to third person.
418. Mere unaccepted payment not enough.
419, 420. When part payment to be made.
421. Part payment to agent suffices.

6. *The Note or Memorandum.*

422. What the statute requires.

a. What is a Note or Memorandum.

423. Is distinct from the agreement itself.
424. At what time to be made.
425. Form of note or memorandum.
426, 427. Several papers.
428. Letters.
429. Telegrams.
430. Books.
431. Records of corporate meetings.
432. Not necessary that note be addressed to or pass between the parties.

b. What Note or Memorandum is Sufficient.

§ 433. The requisites in general.
434. Parties must be named or described.
435. —— What description sufficient.
436. —— Agent named instead of principal.
437. Goods sold must be stated or described.
438. Price must be shown.
439. Terms of credit and mode of payment must be stated.
440. Time and place of delivery must be stated if agreed upon.
441. All other material terms must be included.
442. Consideration need not be expressed unless required by statute.
443. Memorandum must show complete contract.
444. Memorandum must import a sale.
445. Parol evidence not admissible to supply deficiencies.
446, 447. Parol evidence to contradict complete memorandum.
448. But defendant may show memorandum, relied upon by plaintiff, to be incomplete.

c. Of the Signing by the Parties.

449. Whether both parties must sign.
450. —— Written offer accepted by parol.
451. How to be signed.

d. Of Signing by Agent.

452. Who may be agent.
453. How appointed.
454. —— Several owners — One as agent for all.

§ 455–458. How sign.
459. One person as agent for both parties.
460. —— Evidence of authority.
461. Signing by auctioneer.
462. Auctioneer selling his own goods cannot sign for both.
463–466. Broker as agent for both parties.
467. "Bought and sold notes" in English practice.
468. —— English rules governing.
§ 469. —— Bought and sold notes in the United States.
470. —— Revocation of broker's authority.
471. Signing by one partner.
e. Of Alteration of the Memorandum.
472. Effect of alteration.
473. Memorandum not to be altered by parol.
474. Discharge or substitution of agreement may be shown.

§ 280. Purpose of this chapter.— Having now considered the nature of the contract of sale, its parties, the subject-matter and the price, there remains to be considered the effect of the statute of frauds upon the negotiations of the parties.

§ 281. Sales before the statute.— The effect of this famous statute can perhaps best be made manifest by recalling first the requisites of a valid contract of sale at common law before the passing of the statute, particularly inasmuch as the same requisites, as has been seen, still prevail in respect of those contracts to which the statute does not apply.

At the common law, as was seen in a previous chapter, a contract for the sale of goods stands upon the same footing as any other contract, requiring the mutual assent of competent parties for a consideration. Neither a written contract or memorandum, nor an entire or partial delivery, nor an entire or partial payment, nor the payment of earnest, is indispensable, but it is sufficient to pass the title, if such be the intention of the parties, that the terms are definitely agreed upon and the chattel is distinguished, identified or separated from the mass of which it forms a part. The purchaser may then take possession of it, upon paying or tendering the price agreed upon, but not otherwise, unless a credit has been agreed upon, in which case the vendor's lien does not attach.[1]

[1] Simmons v. Swift, 5 B. & C. 862; Dixon v. Yates, 5 B. & Ad. 313; Gilmour v. Supple, 11 Moore, P. C. 566.

A more detailed examination of this subject will be made hereafter, but this will suffice for the present purposes of contrast.

I.

The Statute.

§ 282. The seventeenth section of the statute of frauds. This being the state of the common law, the "Act for the prevention of frauds and perjuries," commonly known as the Statute of Frauds, was passed in the twenty-ninth year of the reign of Charles the Second, and went into effect on the 24th day of June, 1677. Of this act, the seventeenth section chiefly concerns the present inquiry, and reads as follows: "And bee it further enacted, by the authority aforesaid, that from and after the said fouer and twentyeth day of June noe contract for the Sale of any Goods, wares, or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the goods soe sold and actually receive the same or give something in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writing of the said bargaine be made and signed by the partyes to be charged by such contract or their agents thereunto lawfully authorized."

283. ——. Afterwards, because of conflicting decisions as to the application of this statute to executory agreements, further legislation became desirable, and in 1829 Lord Tenterden's Act declared that this seventeenth section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery."

These two statutes are now construed as if incorporated together, the word *value* being substituted for the word *price* in the original act.[1]

§ 284. English sale of goods act.— The present English statute[2] upon this subject provides as follows:

"(1) A contract for the sale of any goods of the value of ten pounds or upward shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

"(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

"(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

"(4) The provisions of this section do not apply to Scotland."

§ 285. The statutes in the United States.— Statutes substantially similar to the English act have been adopted in many, but not all, of the United States. No attempt will be made to give the language of these statutes in full, as they are collected in the various treatises on the subject of the statute and elsewhere, but the following summary of them, so far as applicable to the contracts for the sale of goods, will sufficiently indicate their character:

[1] Scott v. Railway Co., 12 M. & W. 38; Harman v. Reeve, 18 C. B. 587.

[2] Sale of Goods Act, ch. 71, 56 & 57 Vict. 1894, § 4.

§ 286. ——. In Arkansas,[1] Georgia,[2] Massachusetts,[3] Maine,[4] Maryland,[5] Michigan,[6] Missouri,[7] New Hampshire,[8] New Jersey,[9] South Carolina,[10] Vermont[11] and Washington[12] the language is "contract for the sale of goods, wares and merchandise."

§ 287. ——. In South Dakota,[13] Colorado,[14] Idaho,[15] Minnesota,[16] Nebraska,[17] Nevada,[18] New York,[19] Utah,[20] Wisconsin[21] and Wyoming[22] the words used are "contract for the sale of goods, chattels or things in action." In California,[23] Connecticut,[24] Montana,[25] Oregon[26] and North Dakota[27] the words are "agreement for the sale of any personal property." In Iowa[28] the statutory language is the same, but unlike the English and most of the American statutes the act is content with forbidding evidence to be given of the unwritten contract. The Indiana[29] statute invalidates a "contract for the sale of any goods;" and in Florida[30] and Mississippi[31] the wording is "contract for the sale of any personal property, goods, wares or merchandise."

§ 288. ——. In Arkansas, California, Colorado, Idaho, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Carolina,

[1] Digest of Statutes 1894, § 3470.
[2] Code of Statutes 1895, § 2693.
[3] Public Statutes 1882, ch. 78, § 5.
[4] Revised Statutes 1883, ch. 111, § 4.
[5] Corbet v. Wolford, 48 Md. 426.
[6] Compiled Laws 1897, § 9516.
[7] Revised Statutes 1889, § 5187.
[8] General Laws 1878, ch. 220, § 16.
[9] General Statutes 1895, p. 1603, § 6.
[10] Revised Statutes 1893, vol. I, § 2152.
[11] Statutes 1894, § 1225.
[12] General Laws 1897, § 4577.
[13] Compiled Laws of Dakota 1887.
[14] Mill's Statutes, § 2025.
[15] Revised Statutes 1887, § 6009.
[16] General Statutes 1894, § 4210.
[17] Compiled Statutes 1897, § 3183.
[18] General Statutes 1885, § 2631.
[19] Revised Statutes 1896, p. 1886, § 3.
[20] Revised Statutes 1898, § 2469.
[21] Sanborn & Berryman Statutes 1898, § 2308.
[22] Revised Statutes 1887, § 1250.
[23] Deering's Statutes, § 1739; Civ. Code, Div. III.
[24] General Statutes 1888, § 1367.
[25] Civil Code, § 2340.
[26] Hill's Annotated Laws 1892, § 785.
[27] Revised Statutes 1895, § 3958.
[28] Code of 1897, § 4625.
[29] Revised Statutes 1897, § 6944.
[30] Revised Statutes 1892, § 1996.
[31] Code, § 4229.

South Dakota, Vermont, Utah, Washington, Wisconsin and Wyoming the word *price* is used. In Connecticut, Florida and Maine, neither the word *price* nor *value* is used, but simply "agreement for the sale of personal property." In Maryland[1] and South Carolina the English statute is adopted. In Georgia the words "to the amount of" are used.[2]

§ 289. ——. In Connecticut, Colorado, Georgia, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New York, North Dakota, Oregon, South Carolina, South Dakota, Washington, Wisconsin and Wyoming, the amount is fixed at fifty dollars; in Arkansas, Maine, Missouri and New Jersey at thirty dollars; in California, Idaho, Montana and Utah at two hundred dollars; in New Hampshire at thirty-three dollars; in Vermont at forty dollars; and in Florida no limit is prescribed.

§ 290. ——. In Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico,[3] North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia no provision similar to the seventeenth section seems to have been adopted.

§ 291. **The general effect of the statute.**— The general effect of the statute, in the cases to which it applies, will be seen to consist chiefly in the introduction of a new rule of evidence which requires a kind of proof that the common law did not deem necessary. This rule demands either—

(*a*) An actual receipt and acceptance of a part of the goods, or

(*b*) the giving of something in earnest to bind the bargain, or

(*c*) a part payment, or

[1] Corbett v. Wolford, 84 Md. 426, 35 Atl. R. 1088.

[2] For reference to the various statutes see *supra*.

[3] In Childers v. Talbott, 4 N. M. 336, 16 Pac. R. 275, the supreme court adopt the fourth section of the English statute, but are silent as to the seventeenth section, although the reasoning might well apply to either section.

(*d*) a note or memorandum in writing of the bargain, signed by the party to be charged thereby or by his agent thereunto duly authorized

II.

What are Contracts for the Sale of Goods, Wares and Merchandise.

§ 292. Importance of this question.— One of the most important and difficult of the questions presenting themselves under the provisions of this statute is, What is a contract for the sale of goods, wares and merchandise within its operation? Does it apply to executory agreements or only to the completed contract? Is there a contract for the sale when the goods are not *in esse*, but are to be grown, produced or manufactured?

1. *Executory Contracts.*

§ 293. Statute applies to executory contracts.— It was thought at one time in England that the statute had no application to the case of executory contracts by which the present title was not conveyed, but this question was set at rest by Lord Tenterden's Act,[1] and the application of the statute to such contracts has always been recognized by the courts of the United States. Thus it is said in a leading case[2] in Connecticut: "It seems now to be well settled, in accordance with the rules of just interpretation, as well as the dictates of reason and common sense, that a contract for the sale of goods is not without the purview of the statute merely because it is executory."

[1] See *ante*, § 283.

[2] Atwater v. Hough (1861), 29 Conn. 508, 79 Am. Dec. 229. To the same effect: Mechanical Boiler Cleaner Co. v. Kellner (1899), 62 N. J. L. 544, 43 Atl. R. 599 [citing Carman v. Smick (1836), 15 N. J. L. 252; Finney v. Apgar (1865), 31 N. J. L. 266; Pawelski v. Hargreaves (1885), 47 N. J. L. 334, 54 Am. R. 162]; Edwards v. Grand Trunk Ry. Co. (1860), 48 Me. 379, 54 Me. 105; Ide v. Stanton (1843), 15 Vt. 685, 40 Am. Dec. 698; Downs v. Ross (1840), 23 Wend. (N. Y.) 270; Hanson v. Rolter (1885), 64 Wis. 622.

2. *Contracts of Sale or for the Manufacture of Goods.*

§ 294. Statute applies only to contracts for the sale and not for the manufacture of goods.— The statute of frauds, by its express terms, applies only to contracts for the *sale* of goods, wares and merchandise, and not to contracts for their *manufacture.* In the abstract, the distinction between a contract for the sale of goods and a contract for the manufacture of goods seems clear enough, but in respect of the application of this statute the question is one of the most confused and perplexing in the law. Most goods have to be manufactured, and the seller is often the manufacturer. If a contract is made with such a seller for the sale of goods of the kind he makes, and he happens not to have them already made, he must set at work to manufacture them. The fact that he will or must so manufacture them may have been clearly within the contemplation of both parties at the time they made the contract. Is the contract, then, one for the manufacture or the sale of the goods? Suppose, further, that in the particular case the goods are not of the kind that the party usually manufactures, but are to be made in accordance with some special ideas or needs of the other. Is it now a contract for manufacture or sale? Suppose, still further, that the goods are such as the maker never produces except upon the order and to suit the case of the person who orders them, as in the case of a contract to supply a set of artificial teeth; what kind of a contract is this — for manufacture or sale?

Quite widely differing views have, not unnaturally, been taken of these questions, and a full exposition of the subject can scarcely be made without setting forth at some length a few of the leading cases. Beginning with the early English cases, the following will indicate the manner in which the subject has developed:

§ 295. English cases — Immediate sale as the test.— In 1724 the case of *Towers v. Osborne*[1] came before Chief Justice

[1] (1724) 1 Strange, 506.

Pratt. The report is very brief, and may be reproduced entire. "The defendant bespoke a chariot, and when it was made refused to take it; and in an action for the value it was objected that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods. But the chief justice ruled this not to be a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by special agreement, and the seller is to deliver the goods immediately."

§ 296. ——. This case was said to be "directly in point" in *Clayton v. Andrews*,[1] a case which came before Lord Mansfield in 1767. There the defendant had "agreed to deliver one load and a half of wheat to the plaintiff within three weeks or a month from the said agreement, at the rate of twelve guineas a load, to be paid on delivery; which wheat was understood by both parties to be at that time unthrashed. No part of the said wheat so sold was delivered; nor any money paid by way of earnest for the same; nor any memorandum thereof made on writing." The question was whether the contract was within the statute. The trial judge had held the case not to be within the statute, relying upon *Towers v. Osborne*, and the court of king's bench concurred.

§ 297. ——. Both of these cases, however, were distinguished and put on different ground twenty-five years later in *Rondeau v. Wyatt*,[2] before Lord Loughborough. The defendant here "had entered into a verbal agreement to sell and deliver three thousand sacks of flour to the plaintiff, to be put in sacks which the plaintiff was to send to the mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign ports." The exportation proving to be impossible, the defendant refused to deliver the flour and an action for damages ensued. The defense was based upon the statute of frauds, and the court of

[1] (1767) 4 Burrows, 2101.

[2] (1792) 2 Henry Blackstone, 63.

common pleas sustained the defense. Referring to the two cases already noticed Lord Loughborough said: "The case of *Towers v. Osborne* was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In *Clayton v. Andrews*, which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be threshed before the delivery. This, perhaps, may seem to be a very nice distinction, but still the work to be performed in threshing made, though in a small degree, a part of the contract."

§ 298. —— Impossibility of present delivery as the test — Goods not in existence.— In 1814 the case of *Groves v. Buck*[1] was decided. Here "the defendant agreed by parol to purchase of the plaintiff, for a sum exceeding 10*l.*, a quantity of oak pins, which were not then made, but were to be cut of slabs and delivered to the defendant at Weymouth." In an action for not accepting the pins the statute of frauds was again relied upon, and the three cases above referred to were cited. Lord Ellenborough said: "The subject-matter of this contract did not exist in *rerum natura;* it was incapable of delivery and of part acceptance, and where that is the case the contract has been considered as not within the statute of frauds. In *Rondeau v. Wyatt* the thing contracted for existed in the very shape and substance in which it was to be delivered; and it was held that the circumstance of its being to be shipped on board vessels, to be provided by the buyer, for exportation, did not take the case out of the statute. And that is very good sense, for if the thing be capable of delivery at the time, why is it not done; but the same reason does not apply where the goods are not deliverable."

[1] (1814) 3 Maule & Selwyn, 178.

§ 299. ——. In *Garbutt v. Watson*,[1] decided in 1822, the same distinction was made. There it appeared that the plaintiffs, who were millers, made an agreement with the defendant, a corn-merchant, for the sale of one hundred sacks of flour at 50*s.* per sack, to be got ready by the plaintiffs to ship to the defendant's order. There was no memorandum or earnest. The flour at the time of the bargain was not prepared, so as to be capable of being immediately delivered to the defendant. In an action by the sellers the defense of the statute was interposed and the four preceding cases were discussed. The plaintiffs were nonsuited. Abbott, C. J., said: "In *Towers v. Osborne*, the chariot which was ordered to be made would never, but for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction, indeed, is somewhat nice, but the case of *Towers v. Osborne* is an extreme case and ought not to be carried further. I think this case was rightly decided, the contract being one for the sale of goods and falling within the seventeenth section of the statute of frauds." Bayley, J., said: "The nearest case to this is *Clayton v. Andrews*. But that decision was, as it seems to me, corrected by *Rondeau v. Wyatt*. This was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is whether this was a contract for goods, or for work and labor and materials found. I think it was the former, and if so, it falls within the statute of frauds." Holroyd, J., said: "I am of the same opinion. I cannot agree with the judgment of the court in *Clayton v. Andrews*. This was a contract for the sale of goods, and therefore the verdict was right."

§ 300. —— **Work on one's own materials as test.**— In *Smith v. Surman*,[2] decided in 1829, it appeared that the plaintiff, who was the owner of grounds upon which were growing trees which

[1] (1822) 5 Barn. & Ald. 613, 7 Eng. Com. L. 335.

[2] (1829) 9 Barn. & Cress. 561, 17 Eng. Com. Law, 253, 4 Man. & Ryl. 455.

he desired removed, had ordered them cut down. While the work was going on and after part had been felled, defendant orally bargained for the timber at so much per foot, and the trees felled and to be felled were numbered. The defendant also gave some instructions as to the manner of cutting. The defendant afterwards refused to take the timber, alleging its unsoundness. In an action for his failure to take and pay for the timber the defendant relied upon both the fourth and the seventeenth sections of the statute. The court of king's bench held that this was not a contract for the sale of an interest in lands, and was therefore not within the provisions of the fourth section, but that it was a contract of sale within the purview of the seventeenth section. Bayley, J., said: "It seems to me that the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant. *Garbutt v. Watson* is in point." After recalling the facts in that case he proceeded: "I think, therefore, that the contract in this case was only a contract for the sale of goods, wares and merchandise within the seventeenth section of the statute, and that there ought to have been a note or memorandum of it in writing, or a part acceptance, earnest or part payment." Parke, J., after referring to *Groves v. Buck* and *Garbutt v. Watson*, said: "The true question in such cases is as to whether the contract be substantially a contract for the sale of goods, or for work and labor and materials found. In this case the contract was substantially a sale of goods, viz., timber at so much per foot."

§ 301. —— Whether work or materials is the essence of the contract, as test.—In 1856 the case of *Clay v. Yates*[1] came before the court of exchequer. It appeared there that the plaintiff had orally agreed to print for defendant a treatise on military tactics, furnishing the paper and printing five hundred copies, at a certain price per sheet. The book was to con-

[1] (1856) 1 Hurl. & Norm. 73.

tain a dedication to Sir William Napier. When the plaintiff began printing, this dedication had not been written, but was afterwards supplied and put in type before plaintiff had notice of it. When plaintiff came to read the proof of the dedication, he found it to contain libelous matter, and refused to print it. The defendant would not pay for the treatise without the dedication, and the action was brought to recover for printing the treatise. The defense, among other things, was that the contract was for the sale of goods within the seventeenth section. Pollock, C. B., with whom the other judges concurred, said: "The first question is, whether this is a contract for the sale of goods within the seventeenth section of the statute of frauds, and I am of opinion that it is properly a contract for work, labor and materials. . . . It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work; for instance, the paper for printing may be found by the one party, while the ink is found by the printer. In such cases it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble or plaster, where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, the price may be recovered as work, labor and materials. No doubt it is a chattel that was bargained for, and, if delivered, might be recovered as goods sold and delivered, still it may also be recovered as work, labor and materials. Therefore it appears to me that this is properly a contract for work, labor and materials. I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act (9 Geo. IV., ch. 14) applies; and the reason why no cases on this subject are found in the books is that, before Lord Tenterden's Act passed, the statute of frauds did not apply to the case of goods not actually made or fit for delivery. I think, therefore, that the objection does not arise."

§ 302. —— The present English test — Whether the subject-matter is a chattel to be afterwards delivered.— In 1861 arose the case of *Lee v. Griffin*,[1] which has since been regarded as declaratory of the rule in English courts, and which has had a marked influence upon judicial thought in the United States. The plaintiff, a dentist, sued to recover the price of two sets of artificial teeth ordered by a lady who had died before they could be fitted. The defendant was her executor. The declaration was for goods bargained, sold and delivered, and for work and labor done and material furnished. The defense was that the contract was not for labor and material, but for the sale of a chattel, and therefore void under the seventeenth section of the statute of frauds. This defense was sustained. Crompton, J., said:[2] "When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered. . . . I do not agree with the proposition that whenever skill is to be exercised in carrying out the contract that fact makes it a contract for work and labor, and not for the sale of a chattel; it may be the cause of action is for work and labor when the materials supplied are merely ancillary, as in the case put of attorney or printer. But in the present case the goods to be furnished, viz., the teeth, are the principal subject-matter; and the case is nearer that of a tailor, who measures for a garment and afterwards supplies the article fitted." Hill, J., said: "When the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor;" and Blackburn, J., said: "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner as that the result

[1] (1861) 1 Best & Smith, 272, 30 L. Jour. R. (Q. B.) 252.

[2] These quotations are made from the reports of the case in the Law Journal Reports, which differ somewhat in form, but not in substance, from the report in Best & Smith.

would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy. . . . I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel."

§ 303. ——. Mr. Benjamin expressed surprise "that a rule so satisfactory and apparently so obvious" should not have been earlier suggested, and concludes: "From the very definition of a sale, the rule would seem to be at once deducible that, if the contract is intended to result in transferring for a price from A to B a chattel in which A had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale."[1]

§ 304. **American cases — The rule in New York.**— In New York, on the other hand, entirely opposite conclusions are reached, following the rule of *stare decisis*, though the court admit that the modern English doctrine is at once philosophical and comprehensible. In *Cooke v. Millard*,[2] the defendants verbally ordered lumber of the plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut by plaintiffs into sizes required by defendants and placed on plaintiffs' dock. Notice was then to be given to defendants, who were thereupon to remove it. Plaintiffs prepared the lumber, placed it upon the dock, and notified defendants as agreed, but before it was removed the lumber was destroyed by accidental fire. It was held that the contract was one of sale.

§ 305. ——. After stating the English and the Massachusetts rule, the court, speaking through the late Professor T. W. Dwight, Commissioner, said: "The New York rule is still dif-

[1] Benjamin on Sales, § 103.

[2] 65 N. Y. 352, 22 Am. R. 619.

ferent. It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word *sale*. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court, *Parsons v. Loucks*.[1] The contrast between *Parsons v. Loucks*, in this State, on the one hand, and *Lee v. Griffin*,[2] in England, on the other, is, that in the former case the word *sale* refers to the time of entering into the contract, while in the latter reference is had to the time of delivery as contemplated by the parties. If at that time it is a chattel, it is enough, according to the English rule. Other cases in this State agreeing with *Parsons v. Loucks* are *Crookshank v. Burrell*,[3] *Sewall v. Fitch*,[4] *Robertson v. Vaughn*,[5] and *Parker v. Schenck*.[6] These cases are based on certain old decisions in England, such as *Towers v. Osborne*,[7] and *Clayton v. Andrews*,[8] which have been wholly discarded in that country.

[1] 48 N. Y. 17, 8 Am. R. 517.

[2] 1 B. & S. 272.

[3] 18 Johns. (N. Y.) 58, 9 Am. Dec. 187.

[4] 8 Cow. (N. Y.) 215.

[5] 5 Sandf. (N. Y.) 1.

[6] 28 Barb. 38.

[7] 1 Strange, 506.

[8] 4 Burr. 2101.

The leading case in New York is Sewall v. Fitch (1828), 8 Cow. 215. The contract was for a quantity of nails not then on hand, but which the seller said "could soon be knocked off" and sent on the opening of navigation. *Held*, to be a contract for work and labor, and therefore not within the statute. Savage, C. J., said: "Towers v. Osborne and Clayton v. Andrews were rightly determined, though upon a wrong principle, as has since been held both by the common pleas and the king's bench."

In Crookshank v. Burrell (1820), 18 Johns. 58, 9 Am. Dec. 187, the same was held of a contract to make and deliver a wagon at a future day.

In Downs v. Ross (1840), 23 Wend. 270, the contract was for the delivery of wheat, part being then in granary and part unthrashed; that in granary was to be cleaned again and the rest thrashed. *Held*, to be a contract of sale within the statute. Bronson, J., said of the cases cited to the contrary, that, "with a single exception, they all relate to contracts for the sale of a thing *not then in existence*, but which was to be constructed or man-

"The case at bar does not fall within the rule in *Parsons v. Loucks*. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and so far as it

ufactured by the vendor." Citing the cases of the chariot (Towers v. Osborne), the oak pins (Groves v. Buck), the wagon (Crookshank v. Burrell), the buggy (Mixer v. Howarth, 21 Pick., Mass., 205), and the nails (Sewall v. Fitch). The exception in Clayton v. Andrews he pronounced overruled. Cowen, J., dissented.

In Seymour v. Davis (1848), 2 Sandf. 239, a contract to sell and deliver cider in future, to be procured from farmers and refined by the seller, was held within the statute.

In Passaic Mfg. Co. v. Hoffman (1871), 3 Daly, 495, is a review of this subject by Daly, C. J., in which he says: "It may be stated as the result of several well-considered cases that where the contract is for an article coming under the general denomination of goods, wares and merchandise, and it is made with one who sells that kind of commodity to all who traffic in it, the quantity required and the price being agreed upon, it is a contract of sale, and that it in no way affects the character of the contract, in such a case, whether the manufacturer and vendor has, when the order is given, the requisite quantity on hand or has to manufacture it afterward. . . . But if what is clearly contemplated by the agreement is the skill, labor, care or knowledge of the one who fabricates the article or commodity, or if it would not have been produced if the order had not been given for it, or if, when produced, it is unfitted for sale as a general article of merchandise, being adapted for use only by the person ordering it, then the contract is one for work and labor and is not within the statute." He doubted Sewall v. Fitch, and pronounced Downs v. Ross "still more doubtful" and now repudiated. Robertson v. Vaughn, 5 Sandf. 1, and Donovan v. Willson, 26 Barb. 138, were also declared to be discredited since Smith v. New York Cent. R. Co., *supra*. This was followed in Flint v. Corbitt (1876), 6 Daly, 429, where the defendant selected some unfinished furniture and ordered it covered in a certain material to be supplied by the plaintiff. This was held to be a sale within the statute.

In Kellogg v. Witherhead, 6 Thomp. & C. 525, the same was held of a contract to buy hams to be smoked. "The plaintiffs were not to make the hams; they were to smoke them."

In Mead v. Case (1860), 33 Barb. 202, the agreement was for a monument, the pieces of which had been put together, but which the plaintiff was to polish, letter and finish. *Held*, not within the statute. The court said: "It is very plain, I think, that the monument bargained for was to be afterwards made by the plaintiff's labor and skill, and had no existence as such at the time of the bargain. . . . It is precisely this labor and skill that was necessary to convert it into the monument which the plaintiff agreed to furnish. Without this, it was no monument whatever, certainly not to the defendant's deceased

appears, not even the rags, 'except so far as such existence may be argued from the fact that matter is indestructible.' So in *Sewall v. Fitch*, *supra*, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

"Nothing of this kind is found in the present case. The

relatives. A monument is something designed and constructed to perpetuate the memory of some particular person or event. Before the material was polished and the inscriptions engraved upon it, it was a mere structure of stone, blank and meaningless. It was not this stone, in this condition, that the defendant bargained for; if it had been, the contract would most likely have been within the statute. What he bargained for was the necessary labor and skill to convert this stone into an enduring memorial of the dead. This labor and skill did not convert the stone into any article of general merchandise, but into the particular thing bargained for. For any other purpose the valuable material had been wholly destroyed. It was then entirely unfitted for a sale to any other person; or for any other purpose." Daly, C. J., in the case of Passaic Mfg. Co. v. Hoffman, pronounces this reasoning conclusive; on the other hand, Dwight, C., in Cooke v. Millard, *supra*, pronounces it a "border case." Smith, J., dissented.

In Bates v. Coster (1874), 1 Hun, 400, an agreement to buy a stallion colt, to be operated upon and kept by the plaintiff till he got well, was held within the statute. The court doubted Mead v. Case.

In Fitzsimmons v. Woodruff, 1 Thomp. & C. 3, a contract for a marble mantel, to be put up in a house with certain alterations and fixtures, was held within the statute.

In Donnell v. Hearn, 17 N. Y. Wkly. Dig. 463, a contract to manufacture certain lamps of a peculiar and unusual pattern was held not within the statute. So in Pierce v. Bourton, 17 N. Y. Wkly. Dig. 444, of a contract to imitate certain woven goods in felt, of a kind not usually dealt in by the plaintiff.

In Smith v. N. Y. Cent. R. Co., 4 Keyes, 180, it was held that a contract for the delivery of wood to be cut from standing trees is within the statute. Citing Downs v. Ross, and Garbutt v. Watson, and Smith v. Surman, 9 B. & C. 561, a precisely similar case. The court, by Woodruff, J., said: "There would seem no very sensible reason for holding, with reference to two verbal contracts with wagon makers for the purchase and delivery of twenty wagons on a future day named, that one is void because the wagon maker has the wagons on hand, and the other is valid because the other wagon maker must manufacture them in order to their delivery at the time appointed. Without however disregarding the cases which hold that where the substance of the contract is work and labor to be done in converting materials into a new and totally different article, it is not within the statute, we may say that there is no just notion of manufacture involved in an agreement to deliver a specified num-

lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser — dressed and put in a condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed upon principle.

"Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*. It is at once so philosophical, and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this State. So far as authoritative decisions have gone, they must be respected even at the expense of sound principle. The court, however, in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this State is,

ber of cords of firewood; no change in the thing sold and to be delivered is contemplated. The circumstance that it stands in the woods at the time involves nothing more than a necessity to cut it, that it may be delivered. In this respect it is not different from a purchase and agreement to deliver wood of a prescribed length, split into pieces of convenient size, the parties knowing and intending that delivery shall be had of wood already cut, but of a greater length and not split at all." But in Killmore v. Howlett, 48 N. Y. 569, while a similar contract was held not to be for the sale of an interest in lands, the court said it was "rather a contract by the defendant to bestow work and labor upon his own material, and deliver it in its improved condition to the plaintiff."

In Higgins v. Murray, 73 N. Y. 252, a contract to make circus tents, materials to be furnished by the plaintiff, was held not within the statute.

In Hinds v. Kellogg, 13 N. Y. Supp. 922, 133 N. Y. 536, 30 N. E. R. 1148, a contract to furnish circulars, to be used exclusively in the business of the person ordering them, was held not within the statute. To the same point see Pelletreau v. United States Electric Light Co., 34 N. Y. Supp. 125, 13 Misc. 237.

In Warren Chemical Co. v. Holbrook, 118 N. Y. 586, 23 N. E. R. 908, 16 Am. St. R. 788, a contract for the sale and delivery of patent roofing, to be thereafter manufactured and delivered, was held not within the statute, relying on Parsons v. Loucks, 48 N. Y. 17, 8 Am. R. 517.

that when the chattel is in existence, so as not to be governed by *Parsons v. Loucks*, *supra*, the contract should be deemed to be one of sale, even though it may have ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will, however, readily be classified. If, on further discussion, the rule in *Lee v. Griffin* should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature."

§ 306. —— **The Massachusetts rule.**—In Massachusetts a somewhat middle ground is taken, well illustrated in the case of *Goddard v. Binney*.[1] There the defendant had orally ordered of the plaintiff, a manufacturer, a buggy of a certain kind, and gave full instructions as to its construction and finish. The plaintiff made the buggy in all respects as ordered, and when it was completed he notified the defendant and sent him a bill for the price. Plaintiff sent again for a check for the amount, and defendant said he would pay it soon, and would see the plaintiff. Plaintiff sent a third time, and defendant replied that he would "come and see him right away." While matters were in this condition, the buggy was destroyed by accidental fire. Plaintiff finally brought this action for the price. The defense was the statute of frauds, but the contract was held not to be within the statute.

§ 307. ——. In pointing out the distinction which prevails in Massachusetts between the English rule on the one hand, and the New York rule on the other, Ames, J., said:

"According to a long course of decisions in New York and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the

[1] (1874) 115 Mass. 450, 15 Am. R. 112.

vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute.[1] In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*[2] goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute.[3]

"In this Commonwealth, a rule avoiding both of these extremes was established in *Mixer v. Howarth*,[4] and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute.[5] 'The distinction,' says Chief Justice Shaw in *Lamb v. Crafts*,[6] 'we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement.' In *Gardner v. Joy*,[7] a contract to buy a certain number of boxes

[1] Citing Crookshank v. Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187; Sewall v. Fitch, 8 Cow. (N. Y.) 215; Robertson v. Vaughn, 5 Sandf. (N. Y.) 1; Downs v. Ross, 23 Wend. (N. Y.) 270; Eichelberger v. McCauley, 5 H. & J. (Md.) 213, 9 Am. Dec. 514.

[2] 1 B. & S. 272.

[3] Referring to Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

[4] 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

[5] Citing Spencer v. Cone, 1 Metc. (Mass.) 283.

[6] 12 Metc. (Mass.) 353.

[7] 9 Metc. (Mass.) 177.

of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Meigs*[1] and *Clark v. Nichols*.[2] It is true that in 'the infinitely various shades of differ-

[1] 4 Cush. (Mass.) 497.

[2] 107 Mass. 547.

The leading case in Massachusetts is Mixer v. Howarth (1838), 21 Pick. 205, 32 Am. Dec. 256, where the contract was for a carriage in the seller's possession, unfinished, and which he was to finish and line with a certain lining selected by the buyer. This was held not within the statute. Shaw, C. J., said: "Where the contract is a contract of sale, either of an article then existing or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time as where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase or sale of an article to be completed *in futuro*, it is not a sale until an actual or constructive delivery or acceptance, and the remedy for not accepting is on the agreement." Citing Sewall v. Fitch, 8 Cow. (N. Y.) 215; Cooper v. Elston, 7 T. R. 14.

In Lamb v. Crafts (1847), 12 Metc. 353, where one whose business was collecting raw tallow and preparing it for market agreed to "furnish" another in the future with a certain quantity of prepared tallow, *held*, within the statute. Shaw, C. J., said: "Where a person stipulates for a future sale of articles which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract of labor; otherwise when the article is made pursuant to the agreement."

In Clark v. Nichols, 107 Mass. 547, the contract was to deliver ash building stuff and plank, the logs to be sawed into plank at the buyer's direction. *Held*, within the statute.

In Gardner v. Joy (1845), 9 Metc. 177, A asked B what he would take for candles; B said he would take twenty-one cents per pound; A said he would take one hundred boxes; B said they were not made, but he would make and deliver them in the course of the summer. *Held*, within the statute. Shaw, C. J., said: "If it is a contract to sell and deliver goods whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute." So, in Waterman v. Meigs (1849), 4 Cush. 497, an agreement for the delivery of a quantity of planks, for ship-building, at a future time, was held within the statute.

In Smalley v. Hamblin (1898), 170 Mass. 380, 49 N. E. R. 626, it is held that where there is an understanding that the articles are not to be manufactured by the vendor, but are to be procured by him of some other person who manufactures and sells them, and are to be delivered by the

ent contracts,' there is some practical difficulty in disposing of the questions that arise under that section of the statute. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action."

§ 308. —— **The rule in Vermont.**— In a recent case[1] in Vermont the court had before it a contract for the construction of a monument to be erected for the State of Minnesota upon the battle-field at Gettysburg. The court held the contract to be not within the statute, and declared its preference for the Massachusetts rule, saying: "Under this rule the test is, not the non-existence of the article at the time of the bargain, as in New York, nor whether the contract will result in the sale of a chattel, as in England, but whether the goods are such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, or whether they are manufactured especially for the vendee, and on his special order, and not for the general market, and for which they are neither intended nor adapted."

§ 309. —— **The rule in Oregon.**— So in a late case[2] in Oregon an oral contract to manufacture and furnish iron work for

vendor to the purchaser for an agreed price as completed articles of merchandise, the transaction is a sale within the statute of frauds.

[1] Forsyth v. Mann (1896), 68 Vt. 116, 34 Atl. R. 481, 32 L. R. A. 788. The same conclusion is reached where one bought a building situated on the land of the vendor, who was to tear it down and deliver it in the condition of timber,—the contract was held not within the statute. Scales v. Wiley, 68 Vt. 39, 33 Atl. R. 771.

[2] Heintz v. Burkhard (1896), 29 Oreg. 55, 43 Pac. R. 866, 31 L. R. A. 508.

a brick building according to special designs and measurements and suitable for use on that particular building was held not to be a contract of sale within the statute. The court declared the Massachusetts rule to be the one most widely adopted in the United States, but found it unnecessary to express a preference as between it and the New York rule, as the case would be excluded from the operation of the statute under either rule,— under the New York rule as being for an article not in existence when the contract was made, and under the Massachusetts rule as an article made upon special design and not such as the manufacturer usually produced. *Lee v. Griffin* was repudiated.

§ 310. —— **The rule in Washington and Michigan.**— Like results, for like reasons, were reached in Washington.[1] And in Michigan, a contract for the painting of a portrait, not ordered as a chattel having any marketable value, was held not to be a contract of sale within the statute.[2]

§ 311. —— **The rule in Maine and New Hampshire.**— Still a different rule has been laid down in Maine and New Hampshire, based upon the element of the *delectus personæ* supposed to exist in the contract of the parties. Thus in the leading case in Maine,[3] Shepley, J., laid down the rule as follows: "If

[1] Fox v. Utter (1893), 6 Wash. 299, 33 Pac. R. 354 (a monument case); Puget Sound Machinery Co. v. Rigby (1895), 13 Wash. 264, 43 Pac. R. 39.

[2] Turner v. Mason (1887), 65 Mich. 662, 32 N. W. R. 846.

[3] Hight v. Ripley, 19 Me. 137, where a contract by defendants "to furnish as soon as practicable from one thousand to one thousand two hundred malleable iron hoe-shanks, agreeable to patterns left with them on terms," etc., was held not a contract of sale.

So a contract "to procure and deliver, at a certain time and place, one-half of a frame for a vessel, to be hewn and fashioned according to mould," is not for a sale (Abbott v. Gilchrist, 38 Me. 260); nor is a contract to manufacture barrel-staves out of a particular lot of timber at so much per thousand. Crockett v. Scribner, 64 Me. 447. On the other hand, a contract to take "all the wood the plaintiff would put on the line of the road that season" was held a contract of sale, as no element of personality or particular method of manufacture entered into it. Edwards v. Grand Trunk Ry. Co., 48 Me. 379; s. c., 54 Me. 105. And a contract "for the delivery, and not for the manufacture and delivery, of blocks which may have been man-

the contract be one of sale it cannot be material whether the article be then in the possession of the seller or whether he afterward procure or make it. A contract for the manufacture of an article differs from a contract of sale in this: The person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party combined with the materials for which he contracted and to which he is entitled. Hence it has been said that if the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale."

§ 312. ——. In an early New Hampshire case,[1] Bellows, J., says: "If a person contract to manufacture and deliver at a future time certain goods, at prices then fixed or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute. If, on the other hand, the bargain be to deliver goods of a certain description at a future time and they are not existing at the time of the contract, but the seller does not stipulate to manufacture them himself or procure a particular person to do so, the contract is within the statute. The distinction is that in the one case the party stipulates that he will himself manufacture the article, and the buyer has the right to require him to do it, and cannot be compelled to take one as good, or even better, if made by another; while, in the other case, the seller only agrees to sell and deliver the article,

ufactured at the time," is a contract of sale and within the statute. Fickett v. Swift, 41 Me. 65, 66 Am. Dec. 214.

[1] Pitkin v. Noyes, 48 N. H. 294, 2 Am. R. 218. In this case plaintiff made a parol contract with defendant, whereby the latter was to raise three acres of potatoes and deliver them to plaintiff at a stipulated price per bushel. In an action for their non-delivery it was held that it was a question for the jury to determine whether under the contract the defendant was bound to raise the potatoes himself — in which case it would be a contract for work, labor and materials, and not within the statute — or whether he might procure them by purchase or otherwise — which would render it a contract of sale and therefore void.

and is under no obligation to make it himself but may purchase it of another."

§ 313. ——. In a later case,[1] in the same State, however, the court applied the English rule, Foster, J., saying: "Where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. In such case the party supplying the chattel cannot recover for his labor in making it. If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for labor; but if the result of the contract is that the party has done work and labor which end in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.[2] . . . Where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the vendor's bestowing labor on his own raw materials, that is a case of a contract of sale within the statute of frauds."[3]

§ 314. —— **The rule in Wisconsin and California.**— In Wisconsin[4] the court approves the early English cases prior to *Lee v. Griffin*, which they deem to have been controlled by Lord Tenterden's Act, and lays down the rule as follows: "That while an executory contract for the sale of an article for the

[1] Prescott v. Locke, 51 N. H. 94, 12 Am. R. 55. Here it was held that a contract by defendant to buy of plaintiff all the spokes he should manufacture at his mill, not more than one hundred thousand in all, was a contract of sale. "The true construction in this case," said the court, "is that the contract was for the future sale of the spokes when they should be in a state fit for delivery. The vendor, so long as he was sawing the timber and doing any other work preparing it for delivery in the form of spokes, was doing work for himself upon his own materials, and not for the defendants." Citing Smith v. Surman, 9 B. & C. 561.

[2] Citing Lee v. Griffin, 1 B. & S. 272.

[3] Citing Garbutt v. Watson, 5 B. & Ald. 613; Smith v. Surman, *supra*.

[4] Meincke v. Falk, 55 Wis. 427, 13 N. W. R. 545, 42 Am. R. 722. This case contains a very exhaustive review of the authorities. See also Hardell v. McClure, 2 Pin. (Wis.) 289; s. c., 1 Chand. (Wis.) 271; Central Lith. & Eng. Co. v. Moore, 75 Wis. 170, 6 L. R. A. 788; Goodland v. Le Clair, 78 Wis. 176, 47 N. W. R. 268.

price of fifty dollars or more may be within the statute, notwithstanding such article does not at the time exist *in solido*, yet where such contract is to furnish materials and manufacture the article according to the specifications furnished or a model selected, and when without the special contract the thing would never have been manufactured in the particular manner, shape or condition it was, then the contract is essentially for special skill, labor or workmanship, and is not within the statute."

§ 315. ——. **In California** the court adopts the rule as laid down in Wisconsin, and in almost the same language.[1]

§ 316. —— **The rule in New Jersey.**— In New Jersey[2] the rules are said to be, "*First.* That a contract for the sale of goods which is purely executory is as much within the statute as is one to be executed *in præsenti*. *Second.* That where a contract is made for an article not existing at the time *in solido*, and when such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is in substance and effect not for a sale, but for work and materials."

[1] Flynn v. Dougherty, 91 Cal. 669, 14 L. R. A. 230, 27 Pac. R. 1080.

[2] Finney v. Apgar, 31 N. J. L. 266, which was a contract for the sale of a quantity of spokes which the defendant was to "get out." *Held*, within the statute. Pawelski v. Hargreaves, 47 N. J. L. 334, 54 Am. R. 162. In this case the defendants went to the shop of plaintiffs, who were wagon and carriage makers, to purchase brewery trucks. Plaintiffs, not having any on hand, ordered them with defendants' assent from makers in another town, and, when the trucks arrived, plaintiffs accepted and paid for them. Some alterations were made in them by the plaintiffs at defendants' request, and while they were still on plaintiffs' premises, a painter, employed by the defendants, painted their name and business on the trucks. Defendants refused to pay for the trucks when the money was demanded before they were taken from the plaintiffs' premises. In an action for damages, *held*, that the contract was within the statute. The whole subject is again elaborately considered in Mechanical Boiler Cleaner Co. v. Kellner (1899), 62 N. J. L. 544, 43 Atl. R. 599.

§ 317. —— **The rule in New Mexico.**— In a New Mexico case[1] the court said that "the result of the doctrine declared by the greater part of the decisions seems to be that when the work and labor is to be performed upon materials belonging to the vendor, and the chattel, when completed, is to be delivered to the vendee, or when, the materials being the property of the vendor, the goods ordered are of the kind usually manufactured by him, and which he generally sold in the ordinary course of business, the contract is within the statute.

"But when the materials belong to the person to whom the goods are to be delivered when completed, and the other party is simply to expend his skill and labor upon them for the use of the owner, or where the goods to be made are of a special kind which the maker could not sell, unless the person ordering them should take them, the contract is without the statute."

§ 318. —— **The rule in Colorado.**— In a late case[2] in Colorado the court held a contract for the purchase and sale of a number of hemlock ties within the statute, although they were to be prepared from standing timber. The court says: "This was not essential to the contract; the goods might just as well, conformably with the contract, have been obtained by purchase;" and asserts the rule that the true criterion is the condition of the goods at the date fixed for delivery.

§ 319. —— **The rule in Minnesota.**— In a recent Minnesota case,[3] where the contract was for the furnishing of certain glass work in the reconstruction of a building, and the evidence showed that some labor would be necessary upon the materials, as cutting and beveling the plate-glass, setting it in frames and cutting the other glass into sheets of the proper size, before the goods would be ready for use about the building, the court held that the contract was not one for the sale of goods within

[1] Orman v. Hagar, 3 N. Mex. 568, 9 Pac. R. 363.

[2] Ellis v. Denver, etc. Ry. Co., 7 Colo. App. 350.

[3] Brown & Haywood Co. v. Wunder, 64 Minn. 450, 67 N. W. R. 357.

the statute, "but was a contract for the manufacture of articles of special and peculiar design, not suitable for the general trade." As authority for this position the court cites a very early case[1] in the same State, in which, after an exhaustive review of the authorities, an identical conclusion is reached.

In this latter case the plaintiff orally agreed to prepare and fit, for putting up in a specified place, four portable houses; he was only to fit the materials and not to put up the houses. The court said that the contract was not one for the sale of goods, and cites with approval the rule laid down by Mr. Parsons,[2] that if the contract states or implies that the thing is to be made by the seller, blending the price of the thing, and the compensation for materials, work, labor and skill indiscriminately, it is not a contract of purchase and sale within the statute, but is one of hiring and service.

§ 320. —— **The rule in Missouri.**— In a recent case[3] in Missouri the subject is very fully examined, and the following rule is formulated: "That, where the contract is for articles coming under the general denomination of goods, wares and merchandise, the vendor being at the same time a manufacturer and a dealer in them as a merchant, or, so dealing, has them manufactured for his trade by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill or the use of material, or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of

[1] Phipps v McFarlane, 3 Minn. 61 (109).

[2] Parsons on Contracts, vol. II, p. 344 [vol. III, 8th ed., *p. 54].

[3] Pratt v. Miller, 109 Mo. 78, 18 S. W. R. 965, 32 Am. St. R. 656.

frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered."

§ 321. —— **The rule in Georgia.**— In a case[1] in Georgia, often cited, the cases in which the statute may or may not apply, and the rules applicable to them, are classified as follows: "All contracts for the sale of goods, existing at the time *in solido*, and capable of immediate delivery, constitute a class about which there can be no difficulty — they are within the statute, without a case to the contrary. The other class of contracts which are equally free from difficulty are like that in *Towers v. Osborne*, where an agreement is made for goods not *in esse*, and therefore incapable of immediate delivery, but by the agreement to be made by the work and labor and with the material of the vendor, and which, when made, may be reasonably presumed to be unsuited to the general market, such as contracts for the manufacture of goods suited alone to a particular market, or for the painting of one's own portrait. In a former class, the contracts are for the sale of goods upon which no work or labor is to be bestowed. In the latter class, the work and labor and material constitute the prime consideration. They are for work and labor, and are, by authority and upon principle, without the influence of the statute. *Ex equo et bono*, a man who agrees to bestow his labor in the manufacture of goods for a price, and which price he must lose unless the goods are received by him who ordered them, ought to be paid; and a statute which would protect the purchaser from liability in such a case, would be alike impolitic and unjust.

§ 322. ——. "The cases which are difficult of determination are those which partake in some degree of both the classes referred to, yet fall decidedly within neither — contracts for goods upon which some labor must be bestowed to prepare them for delivery, and which, when ready for delivery, are vendible in the general market. . . . There really is but one exception to the operation of the statute, to wit: contracts

[1] Cason v. Cheely (1849), 6 Ga. 554.

for work and labor; and this grows out of the palpable injustice of compelling a man, by law, in any case to lose the price of his labor. All cases which are not within the reason of this exception are not within the exception itself. Hence it is that a contract for goods (cotton bagging or cotton cloth, if you please) which are of pretty uniform value, of common consumption, and therefore very generally in demand, with a manufacturer of these articles, is not within the exception, although not *in esse* at the time, and to make which work and labor are necessary. The manufacturer does not necessarily lose the price of his labor — if the purchaser does not take the goods, others will — the work and labor bestowed are in the line of his business, and his work and labor would be bestowed in the production of such goods had the contract not been made. The goods and their price are the considerations of the contract, and not the work and labor and their price. With greater reason a contract for goods upon which work and labor must be bestowed, not to make them, but to prepare them for delivery, as the threshing of wheat, is not within the exception. In the light of all these views, the rule which we adopt and which I find admirably well expressed by Judge Butler in *Bird v. Muhlinbrink*,[1] is this: Such contracts only are excluded from the operation of the seventeenth section of the statute of frauds 'as primarily contemplate work and labor to be done at the instance of the purchaser and for his use and accommodation, so as to make the work and labor of the contracting vendor, or such as he may procure to be bestowed at his expense, the essential consideration of the contract.' The cases which recognize the principle thus expressed are numerous."

§ 323. —— **The rule in Maryland.**— In a late case[2] in this State, it is said that "from a very early period it has been the settled law of Maryland, where the statute of Charles has always been in force, that when work and labor are to be bestowed by the vendor upon the article sold before it is to be

[1] 1 Rich. (S. C.) L. 199, 44 Am. Dec. 247.

[2] Bagby v. Walker, 78 Md. 239, 27 Atl. R. 1033.

delivered, the contract is not within the statute.[1] And the reason is that when work and labor are necessary to prepare an article for delivery, the work and labor to be done by the vendor form part of the consideration of the contract, and, as these are not within the statute, the sale is not a sale of goods, wares and merchandise within the meaning of the seventeenth section."

§ 324. —— **The rule in Iowa.**— The statute of frauds in Iowa contains an exception which provides that the statute shall not apply "when the article of personal property sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill or money are necessarily to be expended in producing or procuring the same." In a recent case[2] it appeared that the plaintiff had orally contracted with

[1] Eichelberger v. McCauley, 5 H. & J. (Md.) 213, 9 Am. Dec. 514; Rentch v. Long, 27 Md. 188.

[2] Mighell v. Dougherty, 86 Iowa, 480, 53 N. W. R. 402, 17 L. R. A. 755. The court further said: "A brief review of a few cases which support the rule above laid down may better illustrate its application. Baker, Sales, § 54. Chief Justice Shaw held that when a contract is for an article then existing, or such an article as the vendor 'usually has for sale in the course of his business, the statute applies.' Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256. In the same case, Harris, J., expressed the opinion that, if the work and labor required to be done, in order to fit the subject-matter of the contract for delivery, was to be done for the vendor, the case would be within the statute. Story said 'that, where the subject-matter of the contract was not to be created by manufacture, but, being already in existence, was merely to be subjected to certain labor for the purpose of rendering it deliverable, or perhaps even of changing its character, the contract would be within the statute of frauds, it being essentially a contract of sale.' Story, Sales (Perkins' ed.), §§ 260–260*b*. In other words, if the labor and service were wholly incidental to a subject-matter *in esse*, the statute applied." Id., § 260*c*.

"The rule is thus stated in a late Massachusetts case: 'A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of business, manufactures or procures for the general market, whether on hand or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute.' Goddard v. Binney, 115 Mass. 450, 15 Am. R. 112. In O'Neil v. New York & S. P. Min. Co., 3 Nev. 141, the court,

defendant for the delivery to plaintiff, at a certain price, of fifteen hundred bushels of oats, then raised but unthreshed. Defendant, having made default, contended that the contract was within the statute, while plaintiff urged that the case fell

virtually following the rule laid down in Massachusetts, held that, to make the case one for work and labor, the contract should contemplate or require some change in the condition, business or circumstances of the vendor. In Downs v. Ross, 23 Wend. 270, the contract was for the purchase of wheat, only a part of which was threshed, and that which had been threshed was to be further cleaned. It was held that the case was one of sale, not for work and labor. The court said: 'If the thing sold exist at the time *in solido*, the mere fact that the seller is to do something to put it in a marketable condition did not take the contract out of the operation of the statute of frauds.' Cooke v. Millard, 5 Lans. 246; Baker, Sales, §§ 30, 43. In Gilman v. Hill, 36 N. H. 311, it was held that a contract for sheep pelts, to be taken from sheep, was a contract of sale. So a contract for the purchase of all the flax straw to be raised from forty-five bushels of flax seed, and to be 'delivered in a dry condition, free from grass, weeds and all foreign substances,' was held a contract of sale, not for work, labor or skill, in producing the straw. Brown v. Sanborn, 21 Minn. 402. When wheat was sold to be delivered at a certain mill, and there was a conflict in the evidence as to whether all of it was threshed prior to the time of making the contract, and the court refused to instruct the jury that, the wheat existing *in solido* at the time the contract was made, and not having to be raised or manufactured, though unthreshed, it was a contract within the statute of frauds, and the plaintiff could not recover, the case was reversed for the refusal to give the instruction. The court adhered to the doctrine that a contract for the sale of goods which may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery, is within the statute. Hardell v. McClure, 2 Pinn. 289, 1 Chand. 271.

"In a cause decided in 1882 this same court approved the holding in Handell v. McClure, and, in referring to the contract in that case, says: 'It was clearly not a contract for special labor in manufacturing anything, but a contract to sell and deliver a certain quantity of wheat.' Meincke v. Falk, 55 Wis. 437, 13 N. W. R. 545. See Clark v. Nichols, 107 Mass. 547. A contract for the sale of the whole of a crop of cotton for a certain year, to be delivered at a certain price per pound as soon as it could be gathered and prepared for market, was held within the statute. Cason v. Cheely, 6 Ga. 554. The rule we have announced as applicable to the case at bar also finds support in the following cases: Spencer v. Cone, 1 Met. 283; Lamb v. Crafts, 12 Met. 353; Gardner v. Joy, 9 Met. 177; Prescott v. Locke, 51 N. H. 94, 12 Am. R. 55; Atwater v. Hough, 29 Conn. 508, 79 Am. Dec. 229; Finney v. Apgar, 31

within the exception. The court held, however, that the case was not within the exception, but was a contract of sale within the operation of the statute. Upon the first point the court said that the oats were not produced or procured since the contract within the meaning of the exception. "The grain existed at the time of the making of the contract, in the identical form in which it would finally be sold. True, it must be harvested and separated from the straw and chaff. So the grain was not produced by the defendant at all, nor did he procure it. He had the oats, but, to put them in proper shape for market, he must cut, thresh and haul them. All this he would have done at his own instance, even if he had never heard of the plaintiff. This labor, skill and money, then, was not expended specially at the instance of the plaintiff."

§ 325. ——. Upon the second point the court said: "In cases like this we think the true rule is, if the grain is sold and no part of it delivered, and no part of the price is paid, and the contract is not in writing, and the labor, skill and money which is necessary to be expended upon it to fit it for market is such only as, in the ordinary course of the defendant's business, he would be compelled to expend upon it, or devote to it, in order to preserve and care for it as a good husbandman, the case is purely a sale, and comes within the statute. It may be, if the defendant had contracted to plant or raise a crop of such a character or kind as required special skill, labor or work, other than that required in the ordinary performance of his labors incident to raising and harvesting his crops, and such special skill and labor was contemplated at the time the

N. J. L. 266; Edwards v. Grand Trunk R. Co., 48 Me. 379, 54 Me. 105; Sawyer v. Ware, 36 Ala. 675; Bird v. Muhlinbrink, 1 Rich. (S. C.) L. 199.

"The evidence in this case shows without conflict that the defendant expended no work, labor, skill or money on the oats other than he would have done if there had been no contract of sale. The case, then, is one clearly within our statute. The contract not being in writing, no part of the price having been paid, none of the oats having been delivered, no evidence of the contract was properly receivable."

contract was made, and was to be bestowed at the instance of and for the benefit of the plaintiff, that the case would be within the exception provided in our statute."

In a later case[1] a contract for the sale of corn to be shelled, and that unfit for shelling to be thrown out, was held to be within the statute, as no labor was then necessary to produce or procure the corn.

§ 326. —— **The true rule.**— The simplest and most satisfactory rule is doubtless that laid down by the English court in *Lee v. Griffin.* The fact that it was decided in contemplation of Lord Tenterden's Act can be of no importance, inasmuch as it has always been conceded in the United States that the statute of frauds is applicable to executory contracts. The New York distinction between things in existence and those not in existence, while definite and easily applied, is purely arbitrary, and is in manifest conflict with the clear intention of the parties in many cases. The Massachusetts rule, which excludes from the operation of the statute contracts for those articles which the vendor does not usually make, but which he undertakes to make in the particular instance in accordance with the special order of his customer, is more nearly satisfactory; but this distinction also, in some cases, does violence to the intention of the parties, inasmuch as it is usually the result, and not the means or the method, which the parties are contracting for.

Lee v. Griffin, however, has found but little following in the United States, while the Massachusetts rule seems likely to be received with favor wherever the courts are not debarred by earlier decisions from adopting it.

3. *Auction Sales.*

§ 327. **Sales by auction are within the statute.**— Notwithstanding some early doubts, it is now entirely settled that sales

[1] Lewis v. Evans (1899), 108 Iowa, 296, 79 N. W. R. 81. See, also, to same effect: Dierson v. Petersmeyer (1899), — Iowa, —, 80 N. W. R. 389.

of chattels at auction are sales within the operation of the statute of frauds.[1]

4. *Contracts for Exchange or Resale.*

§ 328. Contracts for exchange or resale, when within the statute.— Contracts of barter or exchange are included within the provisions of the seventeenth section.[2] So an independent contract for the rescission of an unconditional sale and the repurchase of the goods is within the statute; but not where the agreement for the rescission and resale was part of the original contract.[3]

III.

What are Goods, Wares and Merchandise.

§ 329. English rule includes only corporeal movable property.— "The seventeenth section of the statute," says Mr. Benjamin (§ 111) in laying down the English rule, "applies to contracts for the sale of 'goods, wares and merchandise,'— words which comprehend all *corporeal* movable property. The statute, therefore, does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights and property. The following cases have been decided on this point: The statute does not apply to a sale of shares in a joint-stock banking company,[4] nor to a sale of stock of a foreign State,[5] nor to a

[1] Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243; Norris v. Blair, 39 Ind. 90.

[2] Bennett v. Hull, 10 Johns. (N. Y.) 364; Rutan v. Hinchman, 30 N. J. L. (1 Vroom), 255; Ash v. Aldrich, 67 N. H. 581, 39 Atl. R. 442; Gorman v. Brossard (1899), 120 Mich. 611, 79 N. W. R. 903.

[3] Wulschner v. Ward, 115 Ind. 219; Johnston v. Trask, 116 N. Y. 136, 22 N. E. R. 377, 15 Am. St. R. 394, 5 L. R. A. 630; Fay v. Wheeler, 44 Vt. 292; Williams v. Burgess, 10 Ad. & E. 499; Dickinson v. Dickinson, 29 Conn. 600; Hilliard v. Weeks, 137 Mass. 304.

Contract for payment of debt in goods is a sale within the statute. Sawyer v. Ware (1860), 36 Ala. 675. *Contra*, Woodford v. Patterson (1860), 32 Barb. (N. Y.) 630.

[4] Humble v. Mitchell, 11 A. & E. 205.

[5] Heseltine v. Siggers, 1 Ex. 856.

sale of railway shares,[1] nor to a sale of shares in a mining company on the cost-book principle,[2] nor to a sale of tenants' fixtures."[3]

§ 330. Rule in United States more comprehensive.— In the United States, as will be observed from the summary given,[4] the statutes are often more comprehensive than the English act, extending to "goods" in some cases, and in others to "personal property." This variance has caused a somewhat different line of results to be reached here, though there is doubtless at the same time a tendency to give the statute in its original form a more liberal interpretation.[5] The general rule in this country unquestionably includes not only corporeal movable property, both animate and inanimate,[6] but also those choses in action "which are subjects of common sale and barter, and which have a visible and palpable form."[7]

§ 331. What included — Stocks — Notes — Inventions, etc. Thus, live animals are included. "For whatever may have been the received meaning formerly of the words 'goods and merchandise,' it is quite certain that at present, according to our standard linguistic authorities, the word goods' may well include oxen."[8]

Stocks in corporations, which are generally not included in England, are here usually deemed to be within the statute, though this ruling in some cases was made under the more comprehensive statutes referred to. In the leading case[9] in Massa-

[1] Tempest v. Kilner, 3 C. B. 249; Bowlby v. Bell, 3 C. B. 284; Bradley v. Holdsworth, 3 M. & W. 422; Duncuft v. Albrecht, 12 Sim. 189.

[2] Watson v. Spratley, 10 Ex. 222; Powell v. Jessopp, 18 C. B. 336.

[3] Lee v. Gaskell, 1 Q. B. Div. 700.

[4] See *ante*, §§ 286, 287.

[5] Thus see, *per* Gray, C. J., in Somerby v. Buntin (1875), 19 Am. R. 459; and Graves, J., in Weston v. McDowell (1870), 20 Mich. 353.

[6] Weston v. McDowell (1870), 20 Mich. 353.

[7] Somerby v. Buntin, *supra*. See also Wood on Statute of Frauds, § 283; Browne on Statute of Frauds, § 295.

[8] Weston v. McDowell (1870), 20 Mich. 353.

[9] Tisdale v. Harris (1838), 20 Pick. (Mass.) 9. So also Boardman v. Cutter (1880), 128 Mass. 388; Pray v. Mitchell (1872), 60 Me. 430; North v.

chusetts, where the statutory language was "goods, wares and merchandise," it was said: "There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions designed by the statute to prevent fraud in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them." On the other hand, in a late case in Maryland,[1] it is said: "A subscription for shares of stock in an ordinary corporation is not a contract for the sale of 'goods, wares and merchandise;' words which comprehend only corporeal movable property. Shares of stock are but choses in action, and are not within the statute."

Promissory notes are also in the doubtful class,[2] and United States treasury checks have been held not to be included.[3] Gold, when "regarded, not as money, but as a commodity," is within the statute;[4] and so are the bills of a State bank;[5] and

Forrest (1843), 15 Conn. 400; Spear v. Bach (1892), 82 Wis. 192, 52 N. W. R. 97; Mayer v. Child (1872), 47 Cal. 142; Fine v. Hornsby (1876), 2 Mo. App. 61; Bernhardt v. Walls (1888), 29 Mo. App. 206; Brownson v. Chapman (1875), 63 N. Y. 625.

So also Southern L. Ins. Co. v. Cole (1852), 4 Fla. 359, though here the statute says "personal property."

[1] Webb v. Baltimore & East Shore Ry. Co. (1893), 77 Md. 92, 26 Atl. R. 113, 39 Am. St. R. 396 [repudiating Colvin v. Williams (1810), 3 H. & J. (Md.) 38, 5 Am. Dec. 417]. See also Gadsden v. Lance (1841), 1 McMul. (S. C.) Eq. 87, 37 Am. Dec. 548; Vawter v. Griffin (1872), 40 Ind. 593; Rogers v. Burr (1898), 105 Ga. 432, 31 S. E. R. 438, 70 Am. St. R. 50.

In Meehan v. Sharp (1890), 151 Mass. 565, 24 N. E. R. 907, it is said to be at least doubtful whether a sale of stock that had not been regularly issued could be brought within the statute.

[2] That they are included: Baldwin v. Williams (1841), 3 Metc. (Mass.) 365; that they are not: Whittemore v. Gibbs (1852), 24 N. H. 484; Vawter v. Griffin (1872), 40 Ind. 593; Hudson v. Weir (1856), 29 Ala. 294.

[3] Beers v. Crowell (1831), Dud. (Ga.) 28.

[4] Peabody v. Speyers (1874), 56 N. Y. 230.

[5] Gooch v. Holmes (1856), 41 Me. 523.

so has been held to be an account against a private person.[1] A bond and mortgage are also to be included.[2]

An invention for which letters patent have not yet been granted is held not within the statute,[3] and the court also expressed an opinion that the letters patent themselves when granted might not be, though this was confessedly *obiter*.[4]

§ 332. —— **Fixtures.**— Whether articles of personal property, so affixed to real estate as to fall within the domain of "fixtures," are, for purposes of sale, within the provisions of the seventeenth section, or whether they are to be governed by the provisions relative to sales of interests in land, is a question of some difficulty. The English courts construe the rule that what is affixed to the realty is to be deemed part of it, with more strictness than the American; but under either system the question whether the article is incorporated into the realty or is only annexed to it is a material one.

§ 333. ——. In the case of the sale by a tenant of a removable fixture, to be removed by the tenant for delivery within

[1] Walker v. Supple (1875), 54 Ga. 178.

[2] Greenwood v. Law (1892), 55 N. J. L. 168, 26 Atl. R. 134.

[3] Somerby v. Buntin (1875), 118 Mass. 279, 18 Am. R. 459.

"The words of the statute," said Gray, C. J., "have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right or franchise, granted by the government, securing to the inventor and his assigns the exclusive right to make, use and vend the article patented; or a share in that right, which has no separate or distinct existence at law until created by the instrument of assignment, would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough.

"But it is not necessary in this case to go so far as to say that a sale of letters patent for an invention is not within the statute of frauds. Before letters patent are obtained, the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered *in specie*, or which, upon any construction, however liberal, can be considered as goods, wares or merchandise."

[4] Jones v. Reynolds (1890), 120 N. Y. 213, 24 N. E. R. 279, assumes the contrary to be true.

A contract for publication of an advertisement is not within the statute. Goodland v. Le Clair (1890), 78 Wis. 176, 47 N. W. R. 268.

the term, there could be little doubt that the sale would be treated as a sale of a chattel; and it is probable, too, that the same result would be reached where the article was to be removed by the buyer during the tenant's term.[1] The same rule would also govern where the owner of a chattel, *e. g.*, a building, places it temporarily on the land of another with the latter's consent: it would retain its character as a chattel whatever might be thought of the assignability of the license to remove it.[2]

§ **334.** ——. So, as between the owner of land and his vendee of chattels thereto annexed to be removed and delivered by the seller, there could be as little doubt that the articles sold would be regarded as goods, wares and merchandise and not as land.[3] And a sale of like articles to be removed by the purchaser has been held not to be a sale of an interest in land.[4] Such a sale authorizes the purchaser to enter upon the land to remove the article, and this license has been held to be irrevocable.[5]

§ **335.** ——. As between such a purchaser, however, and a *bona fide* purchaser who bought the land before the articles had

[1] See cases following in this and the succeeding section. See also Heysham v. Dettre, 89 Pa. St. 506; Powell v. McAshan, 28 Mo. 70.

On a sale by the tenant to his landlord, the fixtures not having been removed during the term, the *fourth* section does not apply (Hallen v. Runder, 1 Cr. Mees. & Ros. 266); nor does the *seventeenth*. Lee v. Gaskell, 1 Q. B. Div. 700. See also South Baltimore Co. v. Muhlbach (1888), 69 Md. 395, 16 Atl. R. 117.

[2] Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195. See also Keyser v. District No. 8 (1857), 35 N. H. 477; Hartwell v. Kelly (1875), 117 Mass. 235.

[3] Bostwick v. Leach, 3 Day (Conn.), 476; Michael v. Curtis (1891), 60 Conn. 363, 22 Atl. R. 949; Long v. White, 42 Ohio St. 59; Moody v. Aiken (1887), 50 Tex. 65; Shaw v. Carbrey (1866), 13 Allen (Mass.), 462. Not unless first severed from the land. Brown v. Roland, 92 Tex. 54, 45 S. W. R. 795.

[4] Rogers v. Cox, 96 Ind. 157, 49 Am. R. 152; Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749; Bostwick v. Leach, 3 Day (Conn.), 476.

[5] Rogers v. Cox, *supra;* Sterling v. Warden, 51 N. H. 217, 12 Am. R. 80; White v. Elwell, 48 Me. 360, 77 Am. Dec. 231; Nettleton v. Sikes, 8 Metc. (Mass.) 34.

been removed and in ignorance of their separate sale, the articles would doubtless be deemed realty, and the purchaser of the land would prevail, leaving the purchaser of the chattels to his remedy against the seller.[1]

§ 336. Growing trees.— Whether a sale of growing trees is a sale of an interest in land is a question upon which the authorities are much in conflict. By a large number of authorities such a sale is regarded as a sale of an interest in lands, and must therefore be made by writing, though, of course, when severed, the trees become personalty.[2] Where the trees are to be severed and taken from the land by the vendee, a parol agreement for their sale, it is said in a well-considered case,[3]

[1] Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675. But see Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254.

In the case of Thayer v. Rock, 13 Wend. (N. Y.) 53, a contract was made by parol for the purchase and sale of a mill site and timber. The contract was entire for both, the mill site being an interest in lands. So much of the contract as related to this was void, since it rested entirely in parol; but it was contended that, as there had been part payment of the purchase price, the contract should be maintained as to the personalty, *i. e.*, the timber; but the court held that the contract, being entire, must stand or fall as a whole; part being clearly void, the whole is bad and will not be sustained.

[2] Slocum v. Seymour, 36 N. J. L. 138, 13 Am. R. 432; Green v. Armstrong, 1 Denio (N. Y.), 550; Buck v. Pickwell, 27 Vt. 157 (but see Fitch v. Burk, 38 Vt. 683; Sterling v. Baldwin, 42 Vt. 306); Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Kingsley v. Holbrook, 45 N. H. 313; Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154; Yeakle v. Jacob, 33 Pa. St. 376; Huff v. McCauley, 53 Pa. St. 206; Pattison's Appeal, 61 Pa. St. 294; Bowers v. Bowers, 95 Pa. St. 477 (but see McClintock's Appeal, 71 Pa. St. 365); Owens v. Lewis, 46 Ind. 488, 15 Am. R. 295; Armstrong v. Lawson, 73 Ind. 498; Cool v. Peters Lumber Co., 87 Ind. 531; Hostetter v. Auman, 119 Ind. 7, 20 N. E. R. 506; Russell v. Myers, 32 Mich. 522; Wetmore v. Neuberger, 44 Mich. 362; Spalding v. Archibald, 52 Mich. 365, 50 Am. R. 253; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198; Hicks v. Smith, 77 Wis. 146, 46 N. W. R. 133; Carpenter v. Medford, 99 N. C. 495, 6 Am. St. R. 535; Potter v. Everett, 40 Mo. App. 152; Deland v. Vanstone, 26 Mo. App. 297; Andrews v. Costican, 30 Mo. App. 29; Railroad Co. v. Freeman, 61 Mo. 80; Alt v. Grosclose, 61 Mo. App. 409, 1 Mo. App. R. 645; Walton v. Lowrey, 74 Miss. 484, 21 S. R. 243; Hirth v. Graham, 50 Ohio St. 57, 33 N. E. R. 90, 40 Am. St. R. 641.

[3] Owens v. Lewis, 46 Ind. 488, 15 Am. R. 295 [citing Pierrepont v. Bar-

"will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance, and, if such license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license, after severance, will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such contract." This seems to be the prevailing rule.[1]

nard, 2 Seld. (N. Y.) 279; Drake v. Wells, 11 Allen (Mass.), 141; Giles v. Simonds, 15 Gray (Mass.), 441, 77 Am. Dec. 373; McNeal v. Emerson, 15 Gray (Mass.), 384; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Heath v. Randall, 4 Cush. (Mass.) 195; Barnes v. Barnes, 6 Vt. 388; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; Smith v. Benson, 1 Hill (N. Y.), 176; Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Bennett v. Scutt, 18 Barb. (N. Y.) 347; Douglas v. Shumway, 13 Gray (Mass.), 498; Erskine v. Plummer, 7 Greenl. (Me.) 447, 22 Am. Dec. 216; Selch v. Jones, 28 Ind. 255]. In Fletcher v. Livingston, 153 Mass. 388, there was a written contract to sell to plaintiff "all the wood and timber standing" on a certain piece of land, "with one year's time to get it off." There was a verbal extension of this time, and, after the vendor's death, a written extension by her administrator. None of the timber was removed within the time so extended and the administrator sold the land. Plaintiff brought an action against the administrator and the purchaser for respectively selling the land and cutting the timber. Said the court: "It is well settled that a contract like that relied on by the plaintiff does not immediately pass a title to property, and is not a sale or a contract for a sale of an interest in land, but an executory agreement for the sale of chattels, to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them. Such a contract, if oral, is not within the statute of frauds, and its construction is the same as if it were in writing. Claflin v. Carpenter, 4 Metc. 580; Giles v. Simonds, 15 Gray, 441; Drake v. Wells, 11 Allen, 141; Hill v. Hill, 113 Mass. 103, 105; United Society v. Brooks, 145 Mass. 410. The subject was fully considered by Chief Justice Bigelow in Drake v. Wells, *ubi supra*, and was discussed in the earlier case of Giles v. Simonds, and it was held that a purchaser of standing wood and timber, after severing the trees from the land, had an irrevocable license to enter and remove them; but that before they are cut his license may at any time be revoked by the land-owner, leaving him no remedy but an action to recover damages for the breach of the contract."

[1] In addition to the cases cited

§ 337. ——. On the other hand, as has been seen, a contract for the sale of trees to be cut and delivered by the vendor has been held to be a sale of chattels,[1] and in some cases a parol contract for the sale of trees to be at once or soon cut and removed by the vendee has been held to fall within the seventeenth section;[2] and in one such case,[3] where the vendee had entered and cut a part of the trees and sold some of them to a third person, but had not yet removed any, and the vendor then forbade him to enter on the land and to cut or remove any of the trees, it was held that the acts of the vendee amounted to a sufficient acceptance and receipt to satisfy the seventeenth section, and that the parol license to enter and take the trees, being thus coupled with a valid sale of them, was irrevocable. That the trees are to be soon removed seems to

above, see Poor v. Oakman, 104 Mass. 309; White v. Foster, 102 Mass. 375; Wilson v. Fuller, 58 Minn. 149, 59 N. W. R. 988. In a written contract for the sale of all the pine timber on certain land, a stipulation that it is to be cut and removed before a certain date is a condition of the grant and not a covenant, and conveys all the designated timber which shall be removed within the time specified. All trees which the grantee cuts down before the time limited become his personal property, which he has a right to remove within a reasonable time, even though the time fixed in the deed has expired. Hicks v. Smith, 77 Wis. 146, 46 N. W. R. 133.

[1] Smith v. Surman, 9 B. & C. 561.

[2] According to these cases, "a sale of standing trees in contemplation of their immediate separation from the soil by either the vendor or vendee is a constructive severance of them, and they pass as chattels, and consequently the contract of sale is not embraced by the statute." Byassee v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481 [citing 1 Greenl. Ev., § 271; Cain v. McGuire, 13 B. Mon. (Ky.) 340]. In Leonard v. Medford (1897), 85 Md. 666, 37 Atl. R. 365, 37 L. R. A. 449, it is said: "In Maryland, Massachusetts, Maine, Kentucky and Connecticut sales of growing trees to be presently cut and removed by the vendee are held not to be within the operation of the fourth section of the statute of frauds." Citing Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Purner v. Piercy, 40 Md. 212, 17 Am. R. 591; Claflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day (Conn.), 476; Erskine v. Plummer, 7 Me. 447, 22 Am. Dec. 216; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, *supra;* Byasse v. Reese, *supra.* See also Crosby Hardwood Co. v. Trester, 90 Wis. 412, 63 N. W. R. 1057.

[3] Marshall v. Green, L. R. 1 C. P. Div. 35.

be the test applied by these cases, and in the one last referred to Lord Coleridge said: "I think we must look to the position of matters at the time of the contract; and I think that where, at the time of the contract, it is contemplated by the parties that the purchaser should derive benefit from his land, then there is a contract within the fourth section; but if the thing purchased is to be immediately withdrawn from the land, then, the parties having had no intention of dealing with any interest in or concerning land, the contract does not fall within that section."

§ 338. ——. In still other cases this distinction is repudiated. Thus in a case in Maryland[1] it is said: "The circumstance that the produce purchased may, or probably or certainly will, derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute. . . . Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether to be severed from the soil by the vendor or to be taken by the vendee under a special license to enter for that purpose, it is still, in contemplation of the parties, a sale of goods only, and not within the statute."

§ 339. ——. Where trees are raised for the purpose of transplanting and sale, as in the case of a nursery, it is held that a parol sale is valid.[2]

§ 340. —— **Growing crops.** — Growing crops are of two kinds — those which spring naturally and perennially from the soil, such as grass, fruit, and the like, and known as *fructus naturales;* and those which do not spring spontaneously from the soil, but grow as the result of planting or sowing of seed

[1] Purner v. Piercy, 40 Md. 212, 17 Am. R. 591.

[2] Whitmarsh v. Walker (1840), 1 Metc. (Mass.) 313; Miller v. Baker, id. 27.

and cultivation, such as corn, wheat and other cereals, potatoes, and the like, which are called *fructus industriales.*

§ 341. —— **Fructus naturales.**—As to the former class, much of the same uncertainty exists which prevails as to growing trees, which obviously belong to the same class, and most of that which has been said regarding trees is applicable here. Mr. Benjamin[1] lays down the English rule as follows: "Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance is governed by the fourth section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares and merchandise, governed by the seventeenth and not by the fourth section of the statute."

In the United States a variety of rules have been suggested, though, in general, the English rule prevails.[2] In some cases it has been thought that if the crops were yet to derive some nourishment from the soil, the contract is to be considered one for an interest in land; but that, where the process of vegetation is over, or where the parties agree that the thing sold shall be immediately removed, the land is regarded as a mere warehouse for the thing sold, and the contract is for goods.

§ 342. —— **Fructus industriales.**—In respect of this class Mr. Benjamin[3] gives the English rule as follows: "Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land

[1] Benjamin on Sales, § 126.

[2] See cases cited *supra* as to growing trees. See also Wescott v. Delano, 20 Wis. 514; Green v. Armstrong, 1 Denio (N. Y.), 550; Cutler v. Pope, 13 Me. 377; Smith v. Leighton, 38 Kan. 544, 5 Am. St. R. 778.

[3] Benjamin on Sales, § 126.

and is not governed by the fourth section of the statute of frauds."

In the United States the same rule prevails,[1] though it is usually held that a sale of the land carries with it the crops growing thereon in the absence of a written reservation of the crops.[2]

Such crops only, it is held, can be regarded as *fructus industriales*, so far as the right to emblements is concerned, as ordinarily repay the labor by which they are produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period.[3]

§ 343. —— **Fruit, hops, etc.**— Many kinds of fruit are properly to be classed under the head of *fructus naturales*, and so it was formerly held of hops. But on account of the great labor required to be annually bestowed upon them, it is now held that hops[4] and many kinds of fruit are rather to be classed among the *fructus industriales*.

§ 344. ——. Thus, in a leading case in Maryland,[5] it was held that a sale of a crop of peaches then growing in the seller's orchard, to be gathered and removed by the purchaser as they matured, was not within the statute as a sale of an interest in land, the court saying that "a growing crop of peaches or other

[1] Carson v. Browder, 2 Lea (Tenn.), 701; Frank v. Harrington, 36 Barb. (N. Y.) 415; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Bricker v. Hughes, 4 Ind. 146; Weatherby v. Higgins, 6 Ind. 73; Moreland v. Myall, 14 Bush (Ky.), 474; Holt v. Holt, 57 Mo. App. 272.

[2] Vanderkarr v. Thompson, 19 Mich. 82; Tripp v. Hasceig, 20 Mich. 254; Scriven v. Moote, 36 Mich. 64; Rugles v. First Nat. Bank, 43 Mich. 192; Coman v. Thompson, 47 Mich. 22; Knapp v. Woolverton, 47 Mich. 292; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.

[3] Graves v. Weld, 5 B. & Ad. 105.

[4] Frank v. Harrington, 36 Barb. (N. Y.) 415; Rodwell v. Phillips, 9 M. & W. 501.

[5] Purner v. Piercy, 40 Md. 212, 17 Am. R. 591. That fruit requiring annual labor, like apples, peaches, blackberries, and the like, is *fructus industriales*, see also Smock v. Smock, 37 Mo. App. 56; Vulicevich v. Skinner, 77 Cal. 239.

fruit, requiring periodical expense, industry and attention in its yield and production, may be well classed as *fructus industriales*, and not subject to the fourth section of the statute." In this case the court, ignoring many of the distinctions often made, lays down the rule as follows: "There is nothing in the vegetable or fruit which is an interest in or concerning land, when severed from the soil, whether trees, grass and other spontaneous growth (*prima vestura*), or grain, vegetables, or any kind of crops (*fructus industriales*) the product of periodical planting and culture; they are alike mere chattels, and the severance may be in fact, as when they are cut and removed from the ground; or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or where he sells the land, reserving them by express provision.

"As a general rule, if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered, as chattels, such a sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land.

"When such is the character of the transaction, it matters not whether the product be trees, grass or other spontaneous growth, or grain, vegetables or other crops raised periodically by cultivation; and it is quite as immaterial whether the product is fully grown or in the process of growing at the time of making the contract.

"The circumstance that the produce purchased may, or probably or certainly will, derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute.

"If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is, in the *interim*, to confer upon the purchaser an exclusive right in the land for a time, for the purpose of making a profit of the growing surface, it is affected by the statute, and must

be in writing, although the purchaser is at the last to take from the land only a chattel."

§ 345. —— **Crops to be raised.**— A contract for the sale of a crop to be raised and delivered by the owner of the soil is clearly not within the provisions of the fourth section,[1] though question might be made whether it was a contract for the sale of goods or a contract for work and labor.[2]

Contracts for crops to be raised by the party who is to have them stand obviously upon different ground.

§ 346. —— **Uncut ice.**— Ice gathered and prepared for the market is, of course, a subject of sale as personalty;[3] but even while yet uncut and ungathered a contract for its sale has been held to be for a sale of personalty. Thus, in the leading case,[4] Campbell, C. J., says: "The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection — if its position in the water can be called a connection — is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water."

§ 347. —— **Minerals.**— Although the term "land" includes what is above and below the surface of the earth, and minerals

[1] Watts v. Friend, 10 B. & C. 446; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. R. 218. See also Webster v. Zielly, 52 Barb. (N. Y.) 482; Talmadge v. Lane, 41 N. Y. Supp. 413, 17 Misc. 731. *Contra*, Bowman v. Conn, 8 Ind. 58.

[2] See Pitkin v. Noyes, *supra*.

[3] See Morse v. Moore, 83 Me. 473, 22 Atl. R. 362, 13 L. R. A. 224, 23 Am. St. R. 783; Murchie v. Cornell, 155 Mass. 60, 29 N. E. R. 207, 14 L. R. A. 492.

[4] Higgins v. Kusterer, 41 Mich. 318, 32 Am. R. 160. But see State v. Pottmeyer, 33 Ind. 402, 5 Am. R. 224.

lying below it are included in the general definition of land, nevertheless when these ores or minerals are severed from their immediate connection with the earth, as they must necessarily be in mining, they cease to be a part of the land and become chattels.[1] Hence a contract by which parties are to work quarries of stone or mines of lead upon another's land is not a contract for the sale of an interest in land when the contract also provides that the parties are to divide the proceeds from the sale of stone so quarried or the minerals so dug;[2] for the parties who work the quarries or mines have no interest in any land, but only in the substances taken by them, which are chattels. So also in the mining States on the Pacific slope the claim to mine or the right to mine is a chattel interest, while the mine itself is realty.[3] The reason for this rule is, that the right rests only upon possession and is not an interest in land.

IV.

Of the Price or Value.

§ 348. Operation of the statute.— As has been seen, the English statute by its terms applies only to contracts for the sale of goods, wares and merchandise of the price or value of ten pounds and upwards; and this provision has been generally adopted in the American States, the limit fixed being usually $50, but varying in other States from no stated amount whatever up to $300.

Consideration has also been given to the various methods of fixing the price, and nothing further need here be said on that subject.

Where the parties have expressly fixed the price, or where it is readily ascertainable from the data or standards agreed upon, the question whether the price or value is such as to

[1] Green v. Ashland Iron Co., 62 Pa. St. 97; Kelley v. Ohio Oil Co., 57 Ohio St. 317, 49 N. E. R. 399, 39 L. R. A. 765.

[2] Treat v. Hiles, 68 Wis. 344.

[3] Hardenbergh v. Bacon, 33 Cal. 356; Table Mount. etc. Co. v. Stranahan, 20 Cal. 198.

make the statute applicable is usually one of little difficulty. Certain unusual questions may, however, present themselves, to which some attention must be paid. Thus —

§ 349. Sales of various articles aggregating more than the limit.— Where a sale is contracted for of various articles, none of which by itself is of the price or value fixed, but the aggregate of which falls within the provisions of the statute, the question of the statute's application presents some difficulty.

The usual rule is that where several articles are sold at substantially the same time and as part of the same transaction, though at a separate price for each article, the contract will be deemed to be entire, and the statute will apply according as the aggregate falls within or without the limit.[1] This has

[1] The leading case upon this subject is that of Baldey v. Parker, 2 B. & C. 37. There the plaintiffs were linen-drapers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of 10*l.* Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a large bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to 70*l.*, and he demanded a discount of 20*l.* per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. *Held*, that this was one entire contract within the seventeenth section. All the judges, Abbott, C. J., Bayley, Holroyd and Best, JJ., gave separate opinions. Abbott, C. J., said: "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley, J., said: "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods for a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the seventeenth section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said: "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to be a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mis-

been held to be so, though the articles were to be delivered at different times;[1] though part were yet to be manufactured;[2] and though the various articles contracted for were at different places and the bargain as to each was made where each article was, but all on the same day.[3]

"The mere fact that a separate price is agreed upon for each article," it is said, "or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time or place or in the conduct of the parties that the whole may be fairly considered one entire transaction."[4]

§ 350. ——. There may be cases, however, where the contract as to each article is distinct, and then the statute must be applied to each sale separately. Thus it has been held that where the terms and responsibilities differ as to the various articles, the contracts are distinct;[5] and so they are where dif-

chief of the statute of frauds, *it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10l.*, it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount." Best, J., said: "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account." Baldey v. Parker is followed in Allard v. Greasert, 61 N. Y. 1, and in the cases cited in following notes. See also Cooke v. Millard, 65 N. Y. 352, 22 Am. R. 619.

[1] Gault v. Brown, 48 N. H. 183, 2 Am. R. 210.

[2] Scott v. Railway Co., 12 M. & W. 33.

[3] Bigg v. Whisking, 14 C. B. 195.

[4] Browne on the Statute of Frauds, § 314.

[5] Thus where there was a sale by auction of various articles, in different amounts and at different prices, the court, after referring to other cases deemed to be entire, said: "But in neither of these cases was there any difference in the terms of sale or of warranty by the seller — the terms were precisely the same, and the guaranty the same, as to every article sold. In the case before us the terms and responsibility were different, and there were two distinct contracts; and it requires no reasoning nor authority to show that two distinct contracts are not one contract."

ferent articles are bought at distinct prices, to be delivered at different times and paid for on delivery.[1]

§ 351. —— **Sales of various articles at auction.**— Although the contrary has been held in the case of sales by auction of distinct parcels of land at separate biddings and for a several price for each,[2] in regard to sales of various articles of personalty by auction it has been held that the same rule applies which applies, as has been seen, to private sales, *i. e.*, that ordinarily the contract is to be regarded as entire for all the articles, even though the articles were numerous and were struck off separately at separate and distinct prices,[3] and that it can make no difference, in this respect, whether the auction continued one day or several days upon the same lot of goods sold on the same terms.[4]

Barclay v. Tracy (1842), 5 Watts & Serg. (Pa.) 45.

[1] Thus where there was negotiation for the sale of apples and a crop of barley, the apples to be delivered immediately, and the barley as soon as a car could be procured for shipping it, the court said: "The articles sold were of different characters: they were to be delivered at different times, and paid for respectively on delivery. The contract was to be executed distributively, as was said by Judge Denio in respect to the hogs sold in the case of Tipton v. Feitner, 20 N. Y. 425. The case seems to me precisely within the rule or exception stated by Chancellor Walworth in Mills v. Hunt, 20 Wend. 434." Aldrich v. Pyatt (1872), 64 Barb. (N. Y.) 391.

In Irvine v. Stone, 6 Cush. 508, where there was an oral contract for the sale of a large quantity of coal, and also for its transportation, it was held that the contract being void as to the sale was void also as to the transportation; but in Harman v. Reeve, 25 L. J. Com. Pl. 257, where the contract was for the sale and pasturing of a mare and colt, worth over 10*l.*, the court, while holding the contract entire, said that a recovery could be had for the pasturing.

[2] Van Eps v. Schenectady, 12 Johns. (N. Y.) 436, 7 Am. Dec. 330.

A fortiori so if a separate memorandum is signed for each. Wells v. Day, 124 Mass. 32.

[3] Mills v. Hunt, 17 Wend. (N. Y.) 336, 20 id. 431; Coffman v. Hampton, 2 Watts & Serg. (Pa.) 377, 37 Am. Dec. 511; Jenness v. Wendell, 51 N. H. 63, 12 Am. R. 48; Tompkins v. Haas, 2 Pa. St. 74 (citing also 1 Salk. 65).

The remarks in Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241, to the contrary, are said, in Jenness v. Wendell, *supra*, to be mere *dicta*.

[4] Jenness v. Wendell, 51 N. H. 63, 12 Am. R. 48.

§ 352. How, when amount uncertain at time of sale.— Where, at the time the contract for the sale is entered into, the amount is uncertain, as where the exact quantity, weight or price is yet to be ascertained, the application of the statute is to be determined by the result.[1] Thus, a contract to sell all the broom-corn which might be raised in a given year on a certain piece of ground at a fixed price per ton,[2] or to sell all the flax-straw at a given price per ton which might be raised from a certain quantity of seed,[3] or to buy all the mules of a given strain which might be bred during a certain season at a fixed price per head,[4] is within the statute where the result shows the aggregate to exceed the statutory limit, though in each case the minimum unit was below the limit.

Where no price at all is expressly agreed upon, Mr. Browne[5] expresses the opinion that the parties, agreeing thus tacitly upon the *quantum valet*, "do contract for a *fair price*, which is capable of being ascertained by proof, and thus their bargain is brought within the reach of the statute, where that price is shown to exceed the amount therein fixed."

V.

Of Acceptance and Receipt.

§ 353. What the statute requires.— The English statute declares, and the American statutes are substantially the same, that no contract of sale of the kind already considered shall be good, unless —

1. The buyer shall accept part of the goods so sold and actually receive the same;

2. Or give something in earnest to bind the bargain, or in part payment;

[1] Watts v. Friend, 10 B. & C. 446; Carpenter v. Galloway (1881), 73 Ind. 418; Brown v. Sanborn (1875), 21 Minn. 402; Bowman v. Conn (1856), 8 Ind. 58.

[2] Bowman v. Conn, *supra*.

[3] Brown v. Sanborn, *supra*.

[4] Carpenter v. Galloway, *supra*.

[5] Browne on Statute of Frauds, § 313.

3. Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

The first of these exceptions must now be considered. And, at the outset, it must be noticed that —

§ 354. Delivery, acceptance and actual receipt are required.— The statute requires two things of the buyer which are here radically different in their nature, neither of which is the equivalent of the other, and neither of which can be dispensed with, *i. e.*, (1) that the buyer shall *accept* part of the goods so sold, and (2) shall *actually receive* the same. But before the buyer can accept and actually receive the goods, it is evident that there must be a delivery of them by the seller. The result, therefore, is to require a delivery by the seller, and an acceptance and actual receipt by the buyer. Each one of these elements may exist without the others, but the absence of any one of them will invalidate the sale. Thus —

1. *Of Delivery by the Seller.*

§ 355. Necessity of delivery.— There must be a delivery of the goods by the seller in pursuance of the contract and with the intention to pass the title.[1] This delivery must also be the voluntary, intentional act of the seller. If, therefore, the purchaser acquires possession of the goods without the seller's consent, by mistake or fraud,[2] or by legal process,[3] or without the seller's knowledge,[4] or after his order for their delivery had been countermanded,[5] or from an agent whose authority was not sufficient or had expired,[6] there will not be such a delivery as the statute contemplates.

[1] Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. R. 462; Smith v. Hudson, 6 B. & S. 431.

[2] Brand v. Focht, 1 Abb. App. Dec. (N. Y.) 185.

[3] Washington Ice Co. v. Webster, *supra*.

[4] Young v. Blaisdell, 60 Me. 272.

[5] Smith v. Hudson, *supra*.

[6] Matthiessen, etc. Co. v. McMahon, 38 N. J. L. 536.

§ 356. But delivery alone not enough.— But, obviously, inasmuch as there may be a form of delivery without either an acceptance or actual receipt by the purchaser, delivery alone is not enough. Thus, though the delivery of goods to a common carrier, consigned to the buyer for transportation to him, may be a sufficient delivery to pass the title, it does not constitute such an acceptance and receipt by the buyer as will satisfy the statute, even though the carrier were one designated by the buyer, unless the latter also authorizes the carrier to accept.[1] The requirements of the statute demand action on the part of both the seller and the buyer, and clearly, therefore, no act of the seller alone, in attempted execution of the contract, can suffice.[2] The fuller expositions of this principle will be found in the following subdivisions.

2. *Of Acceptance by the Buyer.*

§ 357. Acceptance must be shown.— Passing now to the acts required of the buyer, attention will be paid to the requirement of acceptance. Not only must there be a delivery by the seller, but the buyer must also accept a part, at least, of the goods sold. As will be at once seen, there may be both a delivery and a receipt of the goods without an acceptance, as where the buyer has the right to examine the goods after their receipt to determine whether he will accept; but both such a delivery and receipt will not suffice without acceptance.

§ 358. —— Must be voluntary and unconditional.— The acceptance of the goods which will satisfy the requirement of the statute must be the voluntary, unequivocal and unconditional act of the buyer or his authorized agent, manifesting his

[1] See *post*, § 365.

[2] Caulkins v. Hellman, 47 N. Y. 449, 7 Am. R. 461; Taylor v. Mueller, 30 Minn. 343, 44 Am. R. 199, 15 N. W. R. 413; Simmons Hardware Co. v. Mullen, 33 Minn. 195, 22 N. W. R. 294; Fontaine v. Bush, 40 Minn. 141, 41 N. W. R. 465; Jamison v. Simon, 68 Cal. 17, 8 Pac. R. 502; Hansen v. Roter, 64 Wis. 622, 25 N. W. R. 530; Smith v. Brennan, 62 Mich. 349, 28 N. W. R. 892; Ex parte Parker, 11 Neb. 309; Powder Live Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. R. 1019.

intention to accept the goods in pursuance of the contract, and to appropriate them to himself as owner by virtue of the contract.[1]

[1] Hinchman v. Lincoln, 124 U. S. 38; Jones v. Reynolds, 120 N. Y. 213; Stone v. Browning, 51 N. Y. 211, 68 id. 598; Gilman v. Hill, 36 N. H. 311; Remick v. Sandford, 120 Mass. 309; Jones v. Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533; Hausman v. Nye, 62 Ind. 485, 30 Am. R. 199; Hershey Lumber Co. v. St. Paul Sash Co., 66 Minn. 449, 69 N. W. R. 215; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. R. 771; Dauphiny v. Red Poll Creamery Co. (1899), 123 Cal. 548, 56 Pac. R. 451; Young v. Blaisdell, 60 Me. 272; Dinnie v. Johnson (1898), 8 N. Dak. 153, 77 N. W. R. 612.

"To take a contract out of the statute of frauds the vendor must not only act with the purpose of vesting the right of possession in the vendee, but the latter must actually accept with the intention of taking possession as owner." Dierson v. Petersmeyer (1899), — Iowa, —, 80 N. W. R. 389.

In Hinchman v. Lincoln, *supra*, the court said: "In order to take the contract out of the operation of the statute, it was said by the New York court of appeals in Marsh v. Rouse, 44 N. Y. 643, 647, that there must be acts 'of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer' as absolute owner, discharged of all lien for the price. This is adopted in the text of Benjamin on Sales, § 179, Bennett's 4th Am. ed., as the language of the decisions in America. In Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, Gardiner, J., adopts the language of the court in Phillips v. Bistolli, 2 B. & C. 511, 'that to satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner.' And adds, 'This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509. . . . In a word, the statute of fraudulent conveyances and contracts pronounced these agreements, when made, void, unless the buyer should "accept and receive some part of the goods." The language is unequivocal and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance.' Page 265. In the same case Wright, J., said: 'The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. . . . Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. . . .

§ 359. —— No acceptance while awaiting test or opportunity for examination.— Until, therefore, the buyer has had an opportunity to accept, as where the goods are a part of a larger mass from which they have not yet been separated,[1] or while the goods are not yet ready for acceptance, as where the vendor is to do some act in reference to them to put them into the agreed condition,[2] or while the goods are awaiting or being subjected to examination to ascertain whether they will be accepted,[3] there can, of course, be no such acceptance as is here required.

§ 360. Acceptance may be implied.— The acceptance by the buyer need not be express, but may be implied from his acts. As is said in a late case:[4] "The act of acceptance is something over and beyond the agreement of which it is a part performance, and which it assumes as already existing. It is a fact to be proven as are other facts. Acts of ownership constitute strong evidence of acceptance.[5] So, too, does a long and unreasonable delay in returning goods.[6] If a vendee does any act with reference to the thing sold, of wrong if not the owner, or of right if he is the owner, it is evidence that he has accepted it.[7] The rule may be broadly stated that any act from which it may be inferred that the buyer has taken possession as owner presents a question for the jury to determine whether the act was done with intent to accept."[8]

I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract.'"

[1] Knight v. Mann, 118 Mass. 143; Terney v. Doten, 70 Cal. 399.

[2] Gilman v. Hill, 36 N. H. 311; Outwater v. Dodge, 7 Cow. (N. Y.) 85; Wegg v. Drake, 16 U. C. Q. B. 252.

[3] Stone v. Browning, 51 N. Y. 211, 68 id. 598; Remick v. Sandford, 120 Mass. 309; Mechanical Boiler Cleaner Co. v. Kellner (1899), 62 N. J. L. 544, 43 Atl. R. 599.

[4] Jones v. Reynolds, 120 N. Y. 213.

[5] Reed on Statute of Frauds, § 261.

[6] Citing Bushell v. Wheeler, 15 Q. B. 442; Treadwell v. Reynolds, 39 Conn. 31. To same effect: Chambers v. Lancaster (1899), 160 N. Y. 342, 54 N. E. R. 707.

[7] Citing Parker v. Wallis, 5 El. & Bl. 21.

[8] Citing Baines v. Jevons, 7 C. & P.

§ 361. ——. Other illustrations of the same rule are found in such acts of ownership as selling, offering to sell, or pledging the goods,[1] directing the goods, *e. g.*, silverware, to be engraved with the buyer's name;[2] ordering alterations to be made in a carriage and using it;[3] cutting down a part of timber sold and reselling a portion of it,[4] or selecting and marking the trees;[5] taking possession of wood sold and hiring it repiled;[6] expressing satisfaction with an article delivered and asking for other things which are to go with it;[7] trying on a dress made and saying one will take it, though it is then left with the dressmaker temporarily for the buyer's convenience;[8] sending one's servants to take possession of and bale a stack of hay bought, though the whole stack was accidentally burned about twenty minutes after they began;[9] expressing satisfaction with the deposit of the goods for him in a warehouse and making a partial payment of the price, though the buyer had not yet examined them.[10]

§ 362. **When acceptance must occur.**— The acceptance and receipt need not take place at the time the contract of sale is made, but may occur subsequently.[11] Neither is it necessary that the acceptance and the receipt should be contemporane-

288; Pinkham v. Mattox, 53 N. H. 600; Gray v. Davis, 10 N. Y. 285. See also Stockwell v. Baird, 15 Del. 420, 31 Atl. R. 811.

[1] Chaplin v. Rogers, 1 East, 192; Morton v. Tibbett, 15 Q. B. 428; Phillips v. Ocmulgee Mills, 55 Ga. 633; Taylor v. Mueller, 30 Minn. 343, 44 Am. R. 199; Roman v. Bressler, 49 Neb. 368, 49 N. W. R. 368. The paying of freight on goods, opening the boxes and removing a portion of the contents, and giving a chattel mortgage upon them, constitute such acts of ownership as will imply acceptance. Wyler v. Rothschild, 53 Neb. 566, 74 N. W. R. 41.

[2] Walker v. Boulton, 3 U. C. Q. B. (O. S.) 252.

[3] Beaumont v. Brengeri, 5 Com. B. 301.

[4] Marshall v. Green, L. R. 1 C. P. D. 35.

[5] Byassee v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481.

[6] Richards v. Burroughs, 62 Mich. 117.

[7] Schmidt v. Thomas, 75 Wis. 529.

[8] Galvin v. Mackenzie, 21 Oreg. 184, 27 Pac. R. 1039.

[9] Corbett v. Wolford, 84 Md. 426, 35 Atl. R. 1088.

[10] Shaw Lumber Co. v. Manville, — Idaho, ——, 39 Pac. R. 559.

[11] Amson v. Dreher, 35 Wis. 615; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Gault v. Brown, 48 N. H. 183, 2 Am. R. 210; Bush v.

ous, but the goods may be accepted before they are received, or received before they are accepted.[1]

§ 363. **Who may accept — Agent.**— The acceptance may be not only by the buyer himself, but by an agent with sufficient authority.[2] This authority may be conferred in the same manner as in other cases, and may be established either by proof, a prior authorization or a subsequent ratification.[3] It cannot, however, depend upon the same parol agreement which is sought to be rendered valid by the acceptance.[4]

The authority relied upon must, moreover, be adequate to the act to be established. Thus an authority to receive the goods will not, of itself, suffice to warrant an acceptance of them, and *vice versa*.[5]

§ 364. —— **Tenants in common.**— A delivery to and an acceptance by tenants in common will, it is held, be sufficient to support a sale of the goods to one of them.[6]

§ 365. —— **Carrier.**— A carrier employed to transport the goods, even though designated by the buyer, is not thereby authorized to *accept* the goods, though when so designated he is, of course, authorized to *receive* them. To authorize him to accept, some other authorization than his mere employment as a carrier is necessary.[7]

Holmes, 53 Me. 417; Marsh v. Hyde, 3 Gray (Mass.), 331; Ortloff v. Klitzke, 43 Minn. 154, 44 N. W. R. 1085.

[1] Cross v. O'Donnell, 44 N. Y. 661, 4 Am. R. 721; Pinkham v. Mattox, 53 N. H. 600; Knight v. Mann, 118 Mass. 143; Garfield v. Paris, 96 U. S. 557.

[2] Snow v. Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; Jones v. Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533; Gaff v. Homeyer, 59 Mo. 345; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Vanderbilt v. Central R. R. Co., 43 N. J. Eq. 669; Alexander v. Oneida Co., 76 Wis. 56, 45 N. W. R. 21.

[3] See Mechem on Agency, § 81.

[4] Hawley v. Keeler, 53 N. Y. 114.

[5] Taylor, Ev., § 1045.

[6] Wilkinson's Adm'r v. Wilkinson, 61 Vt. 409.

[7] In Johnson v. Cuttle, 105 Mass. 447, 7 Am. R. 545, Gray, J., said: "Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt by him. Such acceptance and receipt may indeed be through an authorized agent. But a common carrier (whether selected

§ 366. —— **Administrator.**— A special administrator cannot, it is held, accept goods in pursuance of a parol contract made by his intestate. Said the court: "While an administrator or executor may be authorized, and under some circumstances compelled, to carry out the terms and provisions of a valid contract entered into by the deceased, he cannot make any contracts for him or ratify his void transactions."[1]

by seller or by the buyer), to whom the goods are intrusted without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer, and to take the case out of the statute of frauds;" citing Snow v. Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; Frostburg Mining Co. v. New England Glass Co., 9 Cush. (Mass.) 115; Boardman v. Spooner, 13 Allen (Mass.), 353, 90 Am. Dec. 196; Quintard v. Bacon, 99 Mass. 185; Norman v. Phillips, 14 M. & W. 277; Nicholson v. Bower, 1 El. & El. 172.

To same effect: Allard v. Greasert, 61 N. Y. 1; Billin v. Henkel, 9 Colo. 394; Simmons Hardware Co. v. Mullen, 33 Minn. 195; Taylor v. Mueller, 30 Minn. 343, 44 Am. R. 199; Atherton v. Newhall, 123 Mass. 141, 25 Am. R. 47; Hudson Furniture Co. v. Freed Furn. Co., 10 Utah, 31, 36 Pac. R. 132; Waite v. McKelvy, 71 Minn. 167, 73 N. W. R. 727; Salomon v. King (1899), 63 N. J. L. 39. 42 Atl. R. 745.

In Iowa, where acceptance is not required by the statute, a delivery to the carrier is enough. Bullock v. Tschergi, 13 Fed. R. 345. Many cases hold that a delivery to a carrier, not designated by the buyer, is not enough, but the facts did not require a ruling as to the effect if the carrier had been designated by the buyer. Hausman v. Nye, 62 Ind. 485, 30 Am. R. 199; Keiwert v. Meyer, 62 Ind. 587, 30 Am. R. 206; Webber v. Howe, 36 Mich. 150, 24 Am. R. 590; Grimes v. Van Vechten, 20 Mich. 410; Rindskopf v. De Ruyter, 39 Mich. 1; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. R. 721; Maxwell v. Brown, 39 Me. 98, 63 Am. Dec. 605; Fontaine v. Bush, 40 Minn. 141, 12 Am. St. R. 722; Simmons Hardware Co. v. Mullen, 33 Minn. 195; Leggett & Meyer Co. v. Collier, 89 Iowa, 144, 56 N. W. R. 417.

In Vermont a delivery to a carrier named by the buyer is held a sufficient acceptance, though the court say: "But this will depend upon the intention of the parties, to be gathered from the circumstances of each case to some extent." Spencer v. Hale, 30 Vt. 314, 73 Am. Dec. 309; Strong v. Dodds, 47 Vt. 348.

But where the goods were to be delivered by the sellers and the buyer was to receive them from the carrier and pay the freight on the sellers' account, it was held that this negatived the idea that the carrier was the buyer's agent to accept. Agnew v. Dumas, 64 Vt. 147, 23 Atl. R. 634.

[1] Smith v. Brennan, 62 Mich. 349, 4 Am. St. R. 867.

§ 367. That buyer ought to accept, not enough.— The question here involved is not whether the buyer *ought*, in point of morals or good faith, to accept the goods, but whether he *has*, in fact, accepted them. He may refuse for entirely frivolous or untenable reasons or for no reasons at all, but so long as he does not accept, for whatsoever reasons, he is not bound.[1] There are occasions when it is important to ascertain whether the goods are such as the buyer ought to accept, but this is not one of them.

§ 368. Whether acceptance must be final and conclusive.— Whether there may be such an acceptance as will satisfy the statute of frauds and yet leave it open to the buyer to afterwards reject the goods as not being such in quantity and quality as the contract calls for, is a question upon which the authorities are not in harmony. In the leading English case[2] there was a sale of wheat by sample, and the purchaser, without examining the bulk, directed its delivery to a carrier and sold it by the same sample to a third person, who rejected it as not in conformity to the sample. The first purchaser thereupon also repudiated his purchase. In an action by the original seller against the first purchaser, Lord Campbell held that there may be an acceptance and receipt within the meaning of the statute, "without the buyer's having examined the goods or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract's having been fulfilled." The court therefore held "that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evi-

[1] Wood on Statute of Frauds, § 305; Gibbs v. Benjamin, 45 Vt. 124; Knight v. Mann, 118 Mass. 143; Hewes v. Jordan, 39 Md. 472, 17 Am. R. 578; Stone v. Browning, 51 N. Y. 211, 68 id. 598. A few cases lay down a contrary rule. See Meyer v. Thompson, 16 Oreg. 194, citing Smith v. Stoller, 26 Wis. 671, and Bacon v. Eccles, 43 id. 227.

[2] Morton v. Tibbett, 15 Q. B. 428.

dence to justify the jury in finding that the defendant accepted and received it."

§ 369. ——. This doctrine, though meeting with some disapproval in England,[1] seems finally to be established there,[2] and has been approved by several of the courts in the United States.[3] In others it has been approved only with modifica-

[1] See Hunt v. Hecht, 8 Exch. 814; Coombs v. Railway Co., 3 H. & N. 510; Castle v. Sworder, 6 H. & N. 828; Smith v. Hudson, 6 B. & S. 431.

[2] Kibble v. Gough, 38 L. T. (N. S.) 204; Rickard v. Moore, 38 L. T. (N. S.) 841.

[3] Remick v. Sandford, 120 Mass. 309; Strong v. Dodds, 47 Vt. 348; Smith v. Stoller, 26 Wis. 671; Garfield v. Paris, 96 U. S. 557; Hinchman v. Lincoln, 124 U. S. 38. See also Meyer v. Thompson, 16 Oreg. 194, 203; Taylor v. Mueller, 30 Minn. 343, 44 Am. R. 199.

In Remick v. Sandford, 120 Mass. 309, the court said: "There may undoubtedly be an acceptance, which will not afford conclusive evidence that the contract has been fulfilled and its terms complied with, and which will yet satisfy the statute and let in evidence of those terms, which otherwise could only be proved in writing. If the buyer accepts the goods as those which he purchased, he may afterwards reject them if they are not what they were warranted to be, but the statute is satisfied. But, while such an acceptance satisfies the statute, in order to have that effect it must be by some unequivocal act done on the part of the buyer, with the intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. Morton v. Tibbett, 15 Q. B. 428; Johnson v. Cuttle, 105 Mass. 447; Knight v. Mann, 118 Mass. 143, and cases cited.

"That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner (as by a resale, which would deprive him of the option to take or decline them, and which is of itself an acceptance), is to be proved by the party setting up the contract. It cannot be inferred, as matter of law, merely from the circumstance that the goods have come into the possession of the buyer. All that the ruling gives to the defendants is the right to reject the goods if they do not correspond to the sample, which they would have had at the common law, even if there had been a written memorandum. But they had more than this, as there was no such memorandum; they had a right arbitrarily to refuse the acceptance of the goods, unless they did or had done some act in relation to them consistent only with their own ownership, and inconsistent with that of the seller. The circumstances under which they received

tions, and in some it is not countenanced at all. Thus, in Maryland, it is said: "Now, it may be readily conceded that the question whether there has been, in any particular case, such acceptance and actual receipt of a part of the goods as will bind the contract, may be quite different and distinct from that as to whether the contract has been fulfilled in respect to quantity and quality of the *residue* of the goods, where the vendee has had no opportunity of examining the goods that may be offered in fulfillment of the contract, and where he has done nothing to preclude himself from the exercise of the right to object that they do not correspond with those actually received by him. The effect of the acceptance and actual receipt of part of the goods, however small, is to prove the contract of sale, and it is not inconsistent with this that the vendee should have the right, with respect to the residue of the goods, when offered in fulfillment of the contract, to object that they are not such in quantity and quality as the contract requires; and in such case the question in dispute can only be determined by

the goods, and the manner in which they acted in reference to them, were to be considered as evidence. These might show that they received the goods with the intent to accept them, as being the goods they purchased, and as the owners of them, but they might also show that they received them only for the purpose of examination. A receipt for such a purpose is not inconsistent with their continuing still the property of the seller. Hunt v. Hecht, 8 Exch. 814; Curtis v. Pugh, 10 Q. B. 111."

In Garfield v. Paris, 96 U. S. 557, the court said: "Authorities almost numberless hold that there is a broad distinction between the principles applicable to the formation of the contract and those applicable to its performance, which appears with sufficient clearness from the language of the statute,—such a contract must be in writing, or there must be some note or memorandum of the same to be subscribed by the party to be charged; but the same statute concedes that the party becomes liable for the whole amount of the goods, if he accepts and receives part of the same, or the evidences, or some of them, of such things in action; and the authorities agree that where the question is whether the contract has been fulfilled, it is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold, in order that the contract may be held to be good, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract. Benjamin on Sales (2d ed.); Hinde v. Whitehouse, 7 East, 558; Morton v. Tibbett, 15 Ad. & E. (N. S.) 428."

the aid of parol evidence. But in all cases where the goods bargained for have been accepted and *actually received* by the vendee, he is thereby precluded, in the absence of fraud, from objecting that they do not correspond with the contract. Any other construction would certainly tend to let in all the evils that were intended to be excluded by the particular provision of the statute."[1]

§ 370. ——. In a leading case[2] in New York, the court say that "the best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the *quantum* or quality of the goods sold."

§ 371. —— **Acceptance of unfinished articles.**— Akin to the subject of the last section is the subject of the acceptance before completion of articles to be manufactured or fitted for delivery. In one case[3] the court said: "There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use." And clearly in such cases acceptance will not be implied, except from unequivocal acts, until the article is completed and ready for delivery.[4]

§ 372. **The burden of proof.**— The burden of proving that there was such an acceptance as will take the case out of the

[1] Hewes v. Jordan, 39 Md. 472, 17 Am. R. 578.

[2] Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, citing Chitty on Contracts, 390; Hilliard on Sales, 135; Maberley v. Sheppard, 10 Bing. 99; Acebal v. Levy, id. 384.

[3] Cooke v. Millard, 65 N. Y. 352, 22 Am. R. 619, citing, as analogous, Bog Lead Co. v. Montague, 10 C. B. (N. S.) 481.

[4] Thus, in Maberley v. Sheppard, 10 Bing. 99, it was held that there was no acceptance to be inferred from the fact that the defendant, who had ordered a wagon made for him by the plaintiff, furnished the iron work, and, during the progress of the work, sent a man to help the plaintiff put it on, and also bought a tilt and sent it to the plaintiff to be put on the wagon.

statute of frauds rests upon the party alleging it.[1] It cannot be inferred as a matter of law merely from the fact that the goods have come into the possession of the buyer.

§ 373. **Question of acceptance is for the jury.**— Where the facts are in dispute, the question whether or not they indicate an acceptance is for the jury to determine.[2] But where the facts in relation to the matter are not in dispute, it belongs to the court to determine their legal effect.[3] "And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence."[4]

§ 374. **Right of seller to retract before acceptance.**— The acceptance must be with the consent of the seller, by virtue of the contract of sale and while that contract is still in force.[5] Hence if, before the buyer accepts, the seller elects to repudiate the agreement and withdraw his offer of sale, he may do so; and he may do this, though there has been an actual receipt of the goods.[6]

3. *Of Receipt by the Buyer.*

§ 375. **Necessity of receipt.**— As has been seen, the statute requires that the buyer shall not only accept but shall also

[1] Remick v. Sandford, 120 Mass. 309.

[2] Hinchman v. Lincoln, 124 U. S. 38; Garfield v. Paris, 96 U. S. 557 [citing Bushel v. Wheeler, 15 Ad. & E. (N. S.) 442; Parker v. Wallis, 5 El. & Bl. 21; Lillywhite v. Devereux, 15 M. & W. 285; Simmonds v. Humble, 13 C. B. (N. S.) 258]: Borrowscale v. Bosworth, 99 Mass. 378, 381; Wartman v. Breed, 117 Mass. 18; Smith v. Stoller, 26 Wis. 671; Amson v. Dreher, 35 Wis. 615; Becker v. Holm, 89 Wis. 86, 61 N. W. R. 307; Galvin v. Mackenzie, 21 Oreg. 184, 27 Pac. R. 1039.

[3] Hinchman v. Lincoln, 124 U. S. 38; Shepherd v. Pressey, 32 N. H. 49, 56.

[4] Hinchman v. Lincoln, 124 U. S. 38 [citing Denny v. Williams, 5 Allen (Mass.), 1, 5; Howard v. Borden, 13 Allen, 299; Pinkham v. Mattox, 53 N. H. 600, 604].

[5] See *ante*, § 355.

[6] Smith v. Hudson, 6 B. & S. 431.

"actually receive" a part of the goods. As has been noticed, too, this actual receipt is to be distinguished from the acceptance and may precede or follow that act, and may therefore exist without it. It is the correlative of the delivery required, which has been already noticed. The result, therefore, is, that there must not only be a delivery by the seller, but an acceptance of that delivery, *i. e.*, an actual receipt of the goods, by the buyer.

§ 376. Nature of the receipt required.— This delivery of the goods by the seller and their receipt by the buyer are acts, and from these acts the intention of the parties and the results effected are to be determined. To satisfy the statute, these acts, it is said in a leading case,[1] "must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer;" and further, "there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner."[2]

§ 377. Fact that title would have passed at common law, not enough.— The fact that the negotiations may have so far progressed that the title would have passed at common law is not enough. Thus, where the plaintiff sued for goods sold and delivered, the trial judge held that, to maintain the action, two facts must be proven by the plaintiff: 1. The passing of the title between the parties at common law; and 2. An acceptance and receipt within the statute of frauds. In approving this ruling, and speaking to the point that proof of the first fact would not dispense with proof of the second, Gray, C. J., said: "In order to constitute an acceptance and receipt under the statute of frauds, it is not enough that the title of the goods has vested in the buyer; but he must have assumed the legal

[1] Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316.

[2] Shindler v. Houston, *supra;* Phillips v. Bistolli, 2 B. & C. 511; Marsh v. Rouse, 44 N. Y. 643; Hinchman v. Lincoln, 124 U. S. 38.

possession of them, either by taking them into the custody or control of himself or of his authorized agent, or by making the seller or a third person his bailee to hold them for him, so as to terminate the seller's possession of the goods and lien for the price."[1]

§ 378. **Constructive delivery and receipt.**— But while the delivery and receipt must be actual, it is not always necessary, as it is not always feasible or possible, that the buyer should take the goods into his physical possession. It was said by Judge Bronson, "There may be a delivery without handling the property or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property and puts it in the power of the buyer, as by delivering the key of the warehouse in which the goods are deposited, or directing a bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner. In such case there is, in addition to the words of bargain, an act by which the dominion over the goods is transferred from the seller to the buyer."[2]

§ 379. ——. So in a Maryland case[3] the court said: "In regard to the proof of a *delivery* of the goods in order to gratify the statute, it must be conceded that an actual or manual delivery is not in all cases necessary. Upon this subject the law is well settled and clearly defined, and may be thus stated: Where the goods are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own, exercising acts of ownership over them, from which possession as owner may be inferred; or where the delivery is symbolical, such as the delivery of the key of the warehouse in which the goods are lodged; or where actual delivery is impracticable and can only be made by such symbolical means as the circumstances of the case will

[1] Rodgers v. Jones, 129 Mass. 420.

[2] Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316. To the same point that delivery may be constructive or symbolic: Wadham & Co. v. Balfour, 32 Oreg. 313, 51 Pac. R. 642.

[3] Atwell v. Miller, 6 Md. 10.

allow, as in the case of a ship or cargo at sea, etc.,—actual or manual delivery is not necessary."

§ 380. —— **What sufficient.**— Illustrations of this symbolical or constructive delivery are numerous. Thus, the delivery of the key of the building in which the goods are stored,[1] though the delivery be made at a point distant from the building,[2] has often been held sufficient; and so is the delivery of the order, receipt or bill of lading usually recognized as the representative of the goods.[3]

Catching and branding of cattle sold and then turning them loose upon a common range is sufficient;[4] and so is going in sight of a lot of logs lying within a boom, showing them to the vendee and thereafter abandoning control over them, that being as effectual a method as the nature of the case would admit;[5] and the delivery of a raft of boards as symbolical of a lot of logs lying in the river, and marked with the same mark as the boards.[6] "Where the goods are so situated," said Shepley, J.,[7] "that a delivery cannot be made at the time of sale, as a vessel at sea, a delivery of such evidence of title as the seller possesses is sufficient until the purchaser can obtain possession.[8] And where goods, though not at sea, are not in the actual but in the constructive possession of the seller, as goods in another's warehouse, or logs in a river; and where it would be very difficult on account of the weight or bulk, as a

[1] Gray v. Davis, 10 N. Y. 285; Packard v. Dunsmore, 11 Cush. (Mass.) 282; Barr v. Reitz, 53 Pa. St. 256; Benford v. Schell, 55 Pa. St. 393; Vining v. Gilbreth, 39 Me. 496; Wilkes v. Ferris, 5 Johns. (N. Y.) 335.

[2] Vining v. Gilbreth, 39 Me. 496.

[3] Bass v. Walsh, 39 Mo. 192; Wadhams v. Balfour, 32 Oreg. 313, 51 Pac. R. 642; Meehan v. Sharp, 151 Mass. 564, 24 N. E. R. 907.

[4] Walden v. Murdock, 23 Cal. 540.

[5] Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Carter v. Willard, 19 Pick. (Mass.) 1.

[6] Boynton v. Veazie, 24 Me. 286.

[7] In Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245.

[8] Citing Lempriere v. Pasley, 2 T. R. 485; Gardner v. Howland, 2 Pick. (Mass.) 599. Thus, the transmission of a bill of sale by mail is a sufficient delivery, and, as against creditors of the vendor, is perfected the moment the letter is mailed. Begley v. Morgan, 15 La. 162, 35 Am. Dec. 188. To like effect: Cocke v. Chapman, 2 Eng. (Ark.) 197, 44 Am. Dec. 536.

vessel on the stocks, and in other cases of a peculiar character, what is denominated a symbolical delivery is sufficient, and this requires the performance of such an act as shows, without any other act to be performed, that the purchaser has a right to take possession, and that the right of the seller to control the property has terminated."[1]

§ 381. ——. So the delivery to the vendee of a bill of parcels, followed by acts of ownership by the vendee, is a sufficient delivery of a large quantity of pig-iron lying on the bank of a canal;[2] and so where parties were negotiating regarding a specific quantity of pig-iron lying by itself, and, having agreed upon the terms, the vendor said to the vendees, "I deliver this iron to you," but before more could be done the iron was seized by the sheriff, it was held that there was a sufficient delivery, at least as against creditors, and the ruling would doubtless be general.[3] "There was here nothing remaining to be done by the vendor to consummate the sale or delivery," said the court. "He had no further claim upon the iron. The ponderous nature of the commodity rendered the removal of it, at that time, impossible. And why should it have been moved? The vendees were there, upon the ground, and went up to receive the iron when it was delivered by the vendor. The delivery was not symbolical, but actual, and it was received by the vendees at the hands of the vendor with the intent to take and hold possession of it. The iron was not to be weighed off and separated from any other, and thus designated. There it was, a parcel of ninety-three tons, by itself."[4]

Other cases are referred to in the notes.[5]

[1] Citing Harman v. Anderson, 2 Camp. (Eng.) 243; Manton v. Moore, 7 T. R. (Eng.) 67; Hollingsworth v. Napier, 3 Cai. (N. Y.) 182, 2 Am. Dec. 268; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Homes v. Crane, 2 Pick. 607.

[2] Van Brunt v. Pike, 4 Gill (Md.), 270, 45 Am. Dec. 126.

[3] Calkins v. Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

[4] Citing Chaplin v. Rogers, 1 East, 192; Stoveld v. Hughes, 14 East, 308; Manton v. Moore, 7 T. R. 67.

[5] In Jones v. Reynolds, 120 N. Y. 213, 24 N. E. R. 279, the delivery of a model of an invention was held to be

§ 382. **Mere words do not constitute a delivery and receipt.**— Mere words, it is held, cannot amount to a delivery and receipt of the goods, but there must be, in addition, some acts of the parties over and above the terms of the contract, indicating on the part of the seller an unequivocal intention to surrender the ownership and possession of the goods to the buyer, and, on the part of the buyer, an intention to assume such ownership and possession in pursuance of the contract. Thus, where the parties negotiating in view of the goods agreed upon terms, the plaintiff making an offer and the defendant saying "It is yours," nothing further being done, the court held that there was no delivery and receipt which would satisfy the statute, the words being rather a communication of the agreement than a delivery of the chattels in pursuance of it.[1] This decision has been followed in many other cases,[2] though with some it is not reconcilable.[3]

§ 383. ——. So long, however, as the statute by its terms requires an actual receipt, it would seem that that rule must be the true one which demands something more than the mere words of the parties indicative merely of their assent to the agreement. It certainly cannot be possible that one portion of the verbal agreement which it is sought to establish can be made use of to authenticate the whole contract.[4] The evident

as compiete a delivery as could be made of the invention.

[1] Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316.

[2] Gorman v. Brossard (1899), 120 Mich. 611, 79 N. W. R. 903; Hallenback v. Cochran, 20 Hun (N. Y.), 416; Dehority v. Paxson, 97 Ind. 253; Kellogg v. Witherhead, 6 Thomp. & Cook (N. Y.), 525; Alderton v. Buchoz, 3 Mich. 322; Hinchman v. Lincoln, 124 U. S. 38; Edwards v. Railway Co., 54 Me. 105; Kirby v. Johnson, 22 Mo. 354.

[3] Calkins v. Lockwood, 17 Conn. 154, 42 Am. Dec. 729, seems directly opposed. Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74, which seems also opposed, did not involve the statute of frauds.

[4] See Alderton v. Buchoz, 3 Mich. 322; Shindler v. Houston, *supra*. See also Hawley v. Keeler, 53 N. Y. 114.

In Alderton v. Buchoz, *supra*, the plaintiff had contracted to sell to the defendant for $70 a quantity of mill irons from a mill recently burned; part of the irons were on the mill-site and others in the cellar of a third person. Defendant knew where the irons were and had examined them, but at the time of the contract the irons were not present; no attempt

purpose of the statute is that the mere *words* of the contract shall be supplemented by *acts* in addition to and in pursuance of that contract.

§ 384. Delivery and receipt where goods still remain in seller's possession.— Where the goods are left in the possession of the seller, the presumption, ordinarily, would be that they had not yet been delivered to and received by the buyer; but where it appears that the terms of the contract have been fully agreed upon and the property has been placed under the dominion of the buyer, who has been requested or permitted it to remain with the seller as the bailee or agent of the buyer, there may be a sufficient delivery and receipt to satisfy the statute.

was made to comply with the statute, "but it was expressly agreed that the defendant should take the property where it then was, *and that the plaintiff should not be troubled to make any delivery.*" Neither party intermeddled with the irons until suit was brought, though defendant on one occasion stated to a third person that he had bought the irons, and asked if the latter had one of them in his possession, and was answered in the negative. Afterwards the third party informed the defendant that he did have the iron in question, to which the defendant replied, "very well." *Held*, that there was no such delivery as would satisfy the statute. Said the court: "The stipulation of the defendant in the agreement to take the irons where they then were was also relied on in the argument as evidence to save the case from the statute. This, however, will not do. This stipulation was a part of the entire verbal agreement and it cannot be separated; hence, the contract being void by the statute, this stipulation must fall with the other provisions," citing Shindler v. Houston, *supra*.

In Gorman v. Brossard (1899), 120 Mich. 611, 79 N. W. R. 903, it appeared that the plaintiff sold the defendant a quantity of stone, which was delivered and accepted. Subsequently the defendant discovered that more stone had been delivered than he ordered, and most of the excess was hauled into an alley and the plaintiff notified that it was subject to his order. The two parties then went together to where the stone lay, and agreed that the plaintiff should take the stone and credit its value against the debt owed by the defendant for it. *Held*, that the transaction was a sale within the statute of frauds; that the agreement within sight of the stone did not constitute a delivery; that the cancellation of the vendor's debt to the vendee was not payment within the meaning of the statute.

§ 385. ——. Thus it has been held sufficient, where, after a sale of horses, the purchaser requests the seller to keep them at livery for him and the seller consents, and thereupon removes them from his sale stable to his livery stable;[1] where, after the sale of a horse, the seller requested the buyer to loan it to him, which was done;[2] where a carriage was bought but was left with the seller to make certain alterations;[3] where sheep were bought but were left, separately yarded, with the seller, who was to keep them for a given time for the buyer, who agreed to pay therefor;[4] where barrels of beef were sold, the purchaser requesting the seller to keep it for him and resell it, and part was so sold by the purchaser's direction;[5] where a sale of hides was agreed upon, and they were separated and marked with the buyer's name, but left, at his request, on storage in the seller's warehouse.[6]

§ 386. —— **Goods remaining in seller's possession as seller.** But there can usually be deemed to be no delivery to and receipt by the purchaser while the goods continue in the possession of the seller as such. Thus, where the sale is for cash, and the goods yet remain in the seller's possession, by virtue of the vendor's lien, awaiting the performance of that condition precedent—payment;[7] or where the goods are to remain in the vendor's possession until a certain date, when payment is to be made,[8]

[1] Elmore v. Stone, 1 Taunt. 457. See also Stockwell v. Baird, 15 Del. 420, 31 Atl. R. 811. But compare Tempest v. Fitzgerald, 3 B. & Ald. 680, and Carter v. Toussaint, 5 B. & Ald. 855.

[2] Marvin v. Wallis, 6 Ell. & B. 726.

[3] Beaumont v. Brengeri, 5 C. B. 301.

[4] Green v. Merriam, 28 Vt. 801.

[5] Janvrin v. Maxwell, 23 Wis. 51.

[6] Safford, Ex parte, 2 Low. (U. S. C. C.) 563.

[7] "As long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." Per Holroyd, J., in Baldey v. Parker, 2 B. & C. 37, 44. To same effect: Safford v. McDonough, 120 Mass. 290; Marsh v. Rouse, 44 N. Y. 643; Edwards v. Railway Co., 54 Me. 105; Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241.

[8] In Terney v. Doten, 70 Cal. 399, the defendants agreed verbally to sell the plaintiff one hundred unbroken horses, at a specified price each, out of a band of horses belonging to them, then running at large. The contract provided that the defendants were to gather up a number of the horses of the band from time to time, from

or security given;[1] or where any other condition precedent to the passing of title remains to be performed by the buyer; or where something remains to be done by the seller to fit the goods for delivery; or where the seller has yet to identify them

which the plaintiff was to select a certain number and commence breaking them, after which the number so selected and broken were to be turned into the defendant's pasture and another selection made in like manner until the whole number agreed to be sold should be gathered up, selected and broken. Thereupon the horses were to be paid for by the plaintiff and then taken by him from the premises of the defendants. The defendants gathered up a number of the horses, from which the plaintiff selected twenty-two, which he broke and turned into the pasture of the defendants. Thereafter the defendants refused to further perform their part of the contract. *Held*, that the contract was void under the statute of frauds. Said the court: "In the case at bar none of the horses forming the subject-matter of the contract ever passed into the absolute possession and control of the plaintiff. There was, therefore, no acceptance and receipt of any of them by plaintiff within the meaning of the statute."

To the same effect is Tempest v. Fitzgerald, 3 B. & Ald. 680, where A agreed to buy a horse from B for cash, and to take him away within a time agreed upon, and about that time A rode the horse and gave directions as to the treatment, but requested that it might remain a further time in B's possession, at the expiration of which time he agreed to take the horse and pay the price, to which B assented, but the horse died before A took him away.

To like effect, also, is Carter v. Toussaint, 5 B. & Ald. 855. There plaintiff sold to defendant a horse for £30, by verbal contract. At the time of the sale the horse required to be fired, which was done, with the approbation of the defendant and in his presence, and it was then agreed that the horse should be kept by the plaintiff for twenty days without charge. At the expiration of the twenty days the horse was taken by plaintiff, at defendant's request, to Kingston Park, to be turned out to grass. There the horse was entered in plaintiff's name, at request of defend-

[1] In Parker v. Mitchell, 5 N. H. 165, there was a sale of an anvil at auction. One of the conditions of the sale was that the purchaser should have a credit of ninety days on giving good security. The bidder removed the anvil a little way in the auction room, but afterwards refused to take it or give security. Said the court: "The circumstance that the buyer took the anvil and moved it is not conclusive evidence to show a delivery by the seller or acceptance by the buyer. At furthest it only shows what might, perhaps, be considered an acceptance if the seller elected so to consider it. For it is clear the buyer had no right to take the anvil until the security was given." To same effect: Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241.

or separate them from a larger mass,[1] — there can be no such delivery and receipt as will satisfy the statute. There must first be a delivery by the seller with intent to give possession of the goods to the buyer.

ant. No time was specified for payment. Afterwards defendant refused to take the horse. *Held*, that the contract of sale was not operative, as the horse had never left the possession of the sellers, who had a lien on him for the price. Elmore v. Stone, 1 Taunt. 457, was distinguished.

In Spear v. Bach, 82 Wis. 192, 52 N. W. R. 97, which was an action for the price of stock alleged to have been sold to defendant, plaintiff testified that he met defendant on a train and there sold and delivered the stock to him: but that afterwards, the defendant, not having the money with him to pay for it, handed it back to plaintiff and requested him to send it to a certain bank and draw on him for the price. Plaintiff sent the stock to the bank with draft attached, but the defendant failed to take it. *Held*, no acceptance and receipt.

In Dole v. Stimpson, 21 Pick. (Mass.) 384, the defendant offered the plaintiff a certain price for a steam-engine, a part of the money to be paid when the engine should be taken away by the defendant, which was to be done in two or three weeks, and the balance to be secured by a promissory note. The plaintiff accepted the offer and said, "then you consider the engine to be yours as it is," and the defendant said "yes." The boiler was set in bricks, in the plaintiff's shop, and could not be removed until they were taken away, and the plaintiff was to take them away, which he did the next week. The defendant told a witness he had bought the engine, and made inquiries on what terms he could get it carried to another place. The bargain was not in writing, and the defendant did not pay or secure any part of the price, and did not take away the engine. It was held that there was no delivery and that the sale was therefore void under the statute of frauds.

In Kirby v. Johnson, 22 Mo. 354, a contract was made for the sale of cattle in the field of the seller. The purchaser told the seller to keep the cattle and feed them until he sent for them, at the expense of the purchaser. The seller agreed to do so, but told the purchaser that, if any of them died, he must bear the loss, to which the latter assented. *Held*, no delivery to take the contract out of the statute of frauds. The court regarded Elmore v. Stone, 1 Taunt. 457 (cited in § 385, *supra*), as overruled, on the strength of Proctor v. Jones, 2 C. & P. 532. Chaplin v. Rogers, 1 East, 192 (cited in § 361, *supra*), was distinguished. The case, however, might well have rested on the ground, also mentioned by the court, that the vendor's lien had not been divested.

[1] Thus on a sale of a quantity of hay, part of a larger mass, there can be no delivery and receipt so long as the hay remains unseparated and unweighed. Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241. In Rodgers v. Jones, 129 Mass. 420, a lot of skins had been sold, to be assorted

§ 387. Delivery and receipt where goods are in possession of a third person.— "When the goods at the time of the sale," says Mr. Benjamin,[1] "are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself; and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself. But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in the possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods, or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it, and until he has so agreed he remains agent and bailee of the vendor."

This assent of the bailee need not be express, but may be inferred from acts or from acquiescence, as in other cases.[2]

and weighed and then to be removed by the purchaser. An agent of the purchaser assisted in assorting part of the skins, and then went away leaving the sellers to complete the work. The sellers did this, set the whole lot apart in bundles marked with the purchaser's name, and notified the latter's agent that the skins were ready for delivery. Before delivery they were burned. *Held*, that there was no acceptance and receipt within the statute. Likewise when two bales of cotton were agreed to be taken from three, but the whole was left in the seller's possession, he to select and deliver the two bales. The contract was held invalid as within the statute. Smith v. Evans, 36 S. C. 69, 15 S. E. R. 344.

[1] Benjamin on Sales, § 174.

[2] A delivery order given to the purchaser does not amount to a receipt until warehouseman accepts it and thereby assents to hold the goods as agent of the vendee. Bentall v. Burn, 3 B. & C. 423. Nor does the delivery of a warrant for the goods to the purchaser, though the purchaser keeps the warrant for ten

§ 388. ——. Where the goods are in a government warehouse, with duties unpaid, not even the agreement of the bailee to deliver them to the vendee will amount to a receipt by the vendee, for the goods are really in the custody of the government and the custodian has no authority to deliver them until the fees are paid and the regulations complied with.[1] And where the custodian of the goods is a prior vendor, having a lien on them for the price, the fact that he is notified of a resale of them to a purchaser who will and does give directions as to their shipment, will not amount to a receipt by such purchaser if the goods are not so shipped and the custodian does nothing to waive his vendor's lien.[2]

Where goods are left with a third person by the vendor with instructions to deliver them to the vendee when called for, but the vendee does not call for them and they remain in the possession of such third person, there is clearly no receipt by the vendee.[3]

§ 389. **Delivery and receipt when goods are already in possession of purchaser.**— Where the goods, at the time of the contract of sale, are already in the possession of the purchaser by virtue of some other arrangement, the nature of the deliv-

months and refuses to return it, but does not present it or get the goods. Farina v. Home, 16 M. & W. 119. Nor is there a receipt where, though the goods are transferred, by the order of the vendor, on the warehouseman's book, but their delivery is subsequently countermanded by the vendor on account of the vendee's failure to pay. Godts v. Rose, 17 C. B. 229.

Where a person in Massachusetts sells some hides in a New York warehouse, and gives a bill of the goods and an order on the warehouseman to the buyer, without notifying the warehouseman, this is not such a delivery to and receipt by the buyer as satisfies the statute. Boardman v. Spooner, 13 Allen (Mass.), 353, 90 Am. Dec. 196.

But where, upon the sale of cotton stored in a warehouse, the seller gave the purchaser an order for it, notifying the warehouseman also of the sale, and the purchaser thereupon applied for the cotton, but the delivery was postponed until next day by agreement between the purchaser and warehouseman, it was held that there was a sufficient receipt. King v. Jarman, 35 Ark. 190, 37 Am. R. 11.

See also Townsend v. Hargraves, 118 Mass. 325, and *post*, chapter on *Delivery*.

[1] In re Clifford, 2 Sawy. 428.

[2] Marsh v. Rouse, 44 N. Y. 643.

[3] Hart v. Tyler, 15 Pick (Mass.) 171.

ery and receipt which will satisfy the statute is necessarily different. It is not necessary that the parties should go through the idle ceremony of returning the property to the seller that he may make a new delivery to the buyer, who is then to receive it anew.[1] It is sufficient that the attitude of the party in possession shall be changed from that of a mere bailee to that of a purchaser in pursuance of the contract of sale, and this change of attitude can be shown by proof of such acts and conduct as indicate it.[2] "If it appears," said the court in the leading case[3] upon the subject, "that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds; as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like."

Whether the acts show a receipt of this nature is ordinarily a question of fact for the jury,[4] though where the facts are not in dispute the court may determine it.[5]

§ 390. Delivery where seller and purchaser occupy same premises.—Where A was at work and living with B upon the latter's farm, and a sale of a part of B's hogs to A was agreed upon, and the parties designated the hogs, but agreed that they should remain upon the farm and be fed and cared for by A with the others until they could be sold, it was held that there was a sufficient delivery to satisfy the statute and as

[1] Snider v. Thrall, 56 Wis. 674, 14 N. W. R. 814.

[2] Edan v. Dudfield, 1 Q. B. 302; Lillywhite v. Devereux, 15 M. & W. 285; Snider v. Thrall, *supra*.

[3] Lillywhite v. Devereux, *supra*.

[4] Edan v. Dudfield; Lillywhite v. Devereux, *supra*.

[5] In Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241, a quantity of hay, part of a large mass, already in the purchaser's barn, was sold at auction. After the sale, the seller offered to weigh and deliver the hay, provided the purchaser would either pay the price or secure the payment. The purchaser refused to do either, and also refused to accept a delivery of the hay from the seller. *Held*, no delivery.

against B's creditors. Said Cooley, J.: "It was all the delivery that could well have been made under the circumstances without requiring Anderson to remove the hogs from the farm where he was employed to some other place where they would have been less in his possession than they were; and for this there could have been no sufficient reason."[1]

§ 391. **Receipt by agent — Common agent.**— The receipt of the goods, like their acceptance, may be not only by the purchaser in person, but also by his authorized agent.[2] But here also the authority of the agent must be adequate and to the point,[3] for authority to accept does not necessarily include authority to receive, any more than the contrary case.[4] This authority, however, like the other, may be express and formal, or its existence may be inferred from acts and conduct.[5] It is not enough, however, that it be created by the same parol agreement sought to be made valid by such receipt.[6]

§ 392. ——. The same person cannot at the same time lawfully act as agent both for the seller and the buyer without their knowledge and consent;[7] but, with such knowledge and

[1] Webster v. Anderson, 42 Mich. 554, 36 Am. R. 452, citing Adams Mining Co. v. Senter, 26 Mich. 73.

Where the owner of a horse rents a barn to keep him in and then sells him to a person who thereafter rents the same barn and continues to keep the horse in it, there is nothing to negative delivery. Hallock v. Alvord, 61 Conn. 194, 23 Atl. R. 131. So also where one who owned a building on the land of another sold the building to the owner of the land on which it stood, and remained therein, paying rent to the vendee, it was held there was a sufficient delivery and acceptance to satisfy the statute. Reinhart v. Gregg, 8 Wash. 191, 35 Pac. R. 1075.

[2] See *ante*, § 363; Michelstetter v. Weiner, 82 Wis. 298, 52 N. W. R. 435; Moore v. Hays, 12 Ind. App. 476, 40 N. E. R. 638.

[3] Spear v. Bach, 82 Wis. 192, 52 N. W. R. 97.

[4] See *ante*, § 363.

[5] See *ante*, § 363; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17.

[6] Hawley v. Keeler, 53 N. Y. 114.

[7] Mechem on Agency, § 66. See Caulkins v. Hellman, 47 N. Y. 449, 7 Am. R. 461; Rodgers v. Jones, 129 Mass. 420; Spear v. Bach, 82 Wis. 192, 52 N. W. R. 97. In the last case it was held that where a person who has agreed to buy shares of stock requests the seller to send the certificate, with draft for price, to a certain bank, where he will take it up, and the seller does so, the bank is

consent, he may act both for the seller in delivering and the buyer in receiving.[1] "There can be no presumption," says Justice Campbell,[2] "that the agent of the two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through with alone."

§ 393. —— **Carrier as agent to receive.**— The authority of a carrier as agent to accept the goods has already been considered.[3] And, in general, the same rule applies in this case as in that. A delivery to a carrier not designated by the purchaser cannot of itself be deemed a receipt by the buyer;[4] but where the purchaser directs the delivery of the goods to a carrier designated by him, such a delivery will satisfy the statute.[5] The authority of the carrier to receive, however, need not be expressly conferred, but may be shown in the same manner as in other cases, as by conduct, acquiescence or ratification. It must, however, have some other origin than the parol agreement which is sought to be validated by such receipt.[6]

§ 394. **Acceptance and receipt may precede the passing of title.**— It is not essential that the absolute legal title to the

not thereby made the agent of the buyer to receive and accept the stock, but is the agent of the seller only.

[1] Mechem on Agency, § 67; Fitzsimmons v. Express Co., 40 Ga. 330, 2 Am. R. 577.

[2] In Adams Mining Co. v. Senter, 26 Mich. 73.

[3] See *ante*, § 365.

[4] Cross v. O'Donnell, 44 N. Y. 661, 4 Am. R. 721; Hausman v. Nye, 62 Ind. 485, 30 Am. R. 199.

[5] Cross v. O'Donnell. 44 N. Y. 661, 4 Am. R. 721; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Caulkins v. Hellman, 47 N. Y. 449, 7 Am. R. 461; Dawes v. Peck, 8 T. R. 330; Wait v. Baker, 2 Ex. 1; Fragano v. Long, 4 B. & C. 219; Dunlop v. Lambert, 6 C. & F. 600; Johnson v. Dodgson, 2 M. & W. 653; Norman v. Phillips, 14 M. & W. 277; Meredith v. Meigh, 2 E. & B. 364; Cusack v. Robinson, 1 B. & S. 299; Smith v. Hudson, 6 id. 431.

[6] Hawley v. Keeler, 53 N. Y. 114.

goods shall pass to the purchaser at the time of the making of the contract of sale, in order to render effective, under the statute, an acceptance and receipt then occurring, but such acceptance and receipt will sustain the contract, although the absolute legal title is not to pass to the purchaser until the happening of some event or the performance of some condition subsequent. Thus, upon a contract of sale upon condition that, though possession is at once given, the legal title shall not pass until the price is paid, the purchaser's acceptance and receipt of the goods at the time the contract is made will satisfy the statute.[1]

§ 395. Receipt and acceptance may be complete though terms of contract in dispute.—"It is quite true," says Mr. Justice Matthews,[2] "that the receipt and acceptance by the vendee under a verbal agreement, otherwise void by the statute of frauds, may be complete, although the terms of the contract are in dispute. Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, are sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on.[3] But as was said by Williams, J.,[4] the acceptance by the defendant must be in the quality of vendee. 'The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee.' The act or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely establish that the relation of vendor and vendee exists."[5]

§ 396. No title passes if goods not received and accepted. Until the goods have been received and accepted, no title, of

[1] Pinkham v. Mattox, 53 N. H. 600.

[2] In Hinchman v. Lincoln, 124 U. S. 38, 54.

[3] Citing Marsh v. Hyde, 3 Gray (Mass.), 331; Townsend v. Hargraves, 118 Mass. 325; Benjamin on Sales, § 170.

[4] In Tomkinson v. Staight, 17 C. B. 697.

[5] Citing Remick v. Sandford, 120 Mass. 309.

course, passes to the purchaser, and they are therefore not subject to levy and sale as his goods at the suit of his creditors.[1]

§ 397. **Question of receipt is for jury.**— Like the question of acceptance,[2] the question whether or not there has been such a delivery and receipt as will satisfy the statute is, where the facts are in dispute, for the jury to determine in view of all the circumstances,[3] though, where the facts are not disputed, the court may dispose of it as a matter of law.

4. *Part of the Goods Sold.*

§ 398. **Acceptance and receipt of part of the goods suffices.**— The statute requires the acceptance and receipt of "part of the goods so sold." It does not designate what part, but clearly requires that it shall be a part of the particular goods so sold. Hence —

§ 399. **Any part, though small, suffices.**—Any appreciable part of the goods, though small, will suffice to satisfy this requirement.[4]

§ 400. **But it must actually be part of the goods sold — Sample — Specimen.**— The part received must be actually a part of the goods so sold. Hence, the acceptance and receipt of a mere sample or specimen *like* the goods sold, but not actually a *part* thereof, is not enough;[5] but if the sample be actually taken from the mass of goods contracted for, diminishing by so much the balance to be subsequently delivered, it will

[1] Winner v. Williams, 62 Mich. 363, 28 N. W. R. 904.

[2] See *ante*, § 373.

[3] See *ante*, § 373; Theilen v. Rath, 80 Wis. 263, 50 N. W. R. 183; Pratt v. Chase, 40 Me. 269; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Pinkham v. Mattox, 53 N. H. 600.

[4] But the mere fact that the owners of several and distinct interests (*e. g.*, the owners of several shares of stock) are acting in unison and considering their several shares as constituting one block will not make the several interests so far one that a delivery of the shares of one will defeat the statute as to the others. Tompkins v. Sheehan (1899), 158 N. Y. 617, 53 N. E. R. 502.

[5] Moore v. Love, 57 Miss. 765; Cooper v. Elston, 7 T. R. 14.

suffice.[1] The sample must, of course, be accepted and actually received within the rules already laid down.[2]

§ 401. At what time the part may be accepted and received.— It is not essential that the part delivery, acceptance and receipt should be at the time of making the contract. The parol agreement, unless revoked, may stand for a mutual agreed proposition, at least for a reasonable time, where none is fixed, and the subsequent acceptance and receipt, while the proposition remains open, of a portion of the goods which were the subject of the parol negotiation, will make the entire contract effective.[3]

[1] Gardner v. Grout, 2 C. B. (N. S.) 340; Moore v. Love, 57 Miss. 765; Gilliat v. Roberts, 19 L. J. Ex. 410.

[2] Thus, a mere taking of a sample in the hand, without any express understanding that such taking was to be a delivery, would amount to nothing. Carver v. Lane, 4 E. D. Smith (N. Y.), 168. Nor taking a sample for the purpose of testing it only, and then refusing to accept. Mechanical Boiler Cleaner Co. v. Kellner (1899), 62 N. J. L. 544, 43 Atl. R. 599. In Dierson v. Petersmeyer (1899), — Iowa, —, 80 N. W. R. 389, the court said: "When making the contract the defendant took some corn in a small sack to send away as a sample. He simply helped himself to this, and it was neither delivered nor taken as part of the corn bought. No part of that sold was accepted." *Held*, not sufficient.

[3] Sprague v. Blake, 20 Wend. (N. Y.) 61; Rickey v. Tenbroeck, 63 Mo. 563; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Davis v. Moore, 13 Me. 424. Where, under a verbal agreement for the sale of a lot of cattle, a part was to be delivered in one week and the remainder in instalments as the buyer might require, *held*, that though the contract when made was void as such under the statute, it was good as a proposition concerning the price, and the subsequent delivery and acceptance of the first instalment, at the time fixed, without any change in the proposition, made it binding and took it out of the statute. Rickey v. Tenbroeck, 63 Mo. 563.

Where the contract is entire, the acceptance and receipt of a part of the goods, though shipped at a different time from the other, will make the entire contract valid. Farmer v. Gray, 16 Neb. 401.

Where the part was not accepted and received until after the expiration of the time within which the whole contract was to have been completed, the court doubted whether such part receipt would save the contract; but the point was immaterial, as the court found that a new contract was made at the time of the part delivery, which new contract was made good by such part delivery. Damon v. Osborn, 1 Pick. (Mass.) 476. 11 Am. Dec. 229.

On January 1, plaintiff made a

And this is true even though the goods consist of several parcels, or are to be delivered in instalments at different times.[1]

§ 402. After part acceptance and receipt, loss of remainder before delivery falls on purchaser.— The entire contract being thus made effective by the part acceptance and receipt, the rights and liabilities of the parties must be determined as of the date of the agreement. Hence, if after a part acceptance and delivery the remainder of the goods, though still in the hands of the seller, are destroyed without his fault, the loss must fall upon the purchaser.[2]

§ 403. Acceptance and receipt of part must be in pursuance of contract.— The acceptance and receipt of the part must be in pursuance of and with the intention of performing the entire contract, of whose continuing existence they are to be the recognition. If, therefore, at the time of receiving the part the buyer repudiates the contract, and receives the part as being the maximum extent of his obligation, such an acceptance and receipt cannot save the contract as to the residue.[3]

parol contract with defendant to sell him all the wood upon a certain lot at a fixed price per cord, and to deliver as much as he could that winter and the balance the winter and year following, the defendant to pay on demand for amount delivered at the close of each winter's delivery. Plaintiff delivered a portion of the wood that year, which was accepted and paid for; the remainder he delivered the winter and spring following, but defendant refused to accept or pay for it. *Held*, that the contract was entire, and that the delivery and acceptance of the first part took the whole contract out of the statute. Gault v. Brown, 48 N. H. 183, 2 Am. R. 210. See also Edgar v. Breck, 172 Mass. 581.

[1] See cases in foregoing note.

So also in Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. R. 259, where there was a sale of a quantity of onions, aggregating three car-loads, it was held that the delivery and acceptance of one car-load satisfied the statute as to the whole transaction. See also to the same point, Fruit Co. v. McKinney, 65 Mo. App. 220.

[2] Townsend v. Hargraves, 118 Mass. 325; Vincent v. Germond. 11 Johns. 283; Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. R. 259.

[3] Atherton v. Newhall, 123 Mass. 141, 25 Am. R. 47, citing Townsend v. Hargraves, 118 Mass. 325, 333; Remick v. Sandford, 120 id. 309.

5. *Earnest or Part Payment.*

a. Of Earnest.

§ 404. Earnest and part payment synonymous.— The idea of giving something in earnest to bind the bargain was borrowed from the civil law,[1] and among the Romans earnest consisted of money or some gift or token given by the buyer to the seller and accepted by the latter in recognition of the final and conclusive assent of the parties to the bargain. As such it was formerly in use in England.[2]

In modern times, however, earnest and part payment are regarded as synonymous. Thus it is said in Massachusetts: "As used in the statute of frauds, 'earnest' is regarded as a part payment of the price."[3] But no sufficient reason is apparent why the giving of some token in earnest should not still have its ancient effect.

§ 405. The thing in earnest must be actually given.— But to have the effect contemplated by the statute, the thing in earnest must actually be given by the buyer and received by the seller. The mere crossing of the vendor's hand, therefore, by the buyer with a piece of silver, which the latter afterwards puts back into his pocket and retains, is not sufficient.[4]

§ 406. And must be a thing of some value — Buyer's note. So it is held that the thing in earnest must be a thing of value. Therefore the buyer's own note for a part of the purchase price, being without other consideration than the parol agreement, was held insufficient as earnest, as being of no value.[5]

[1] Howe v. Hayward, 108 Mass. 54, 11 Am. R. 306; Benjamin on Sales, § 189.

[2] Benjamin on Sales, § 189, citing Bracton, l. 2, c. 27; Bach v. Owen (1793), 5 T. R. 409; Goodall v. Skelton (1794), 2 H. Bl. 316.

[3] Howe v. Hayward, 108 Mass. 54, 11 Am. R. 306, citing 2 Bl. Com. 447; Pordage v. Cole, 1 Saund. 319*h*; Langfort v. Tiler, 1 Salk. 113; Morton v. Tibbett, 15 Q. B. 428; Walker v. Nussey, 16 M. & W. 302; 1 Dane's Abr. 235.

[4] Blenkinsop v. Clayton, 7 Taunt. 597.

[5] Krohn v. Bantz, 68 Ind. 277.

§ 407. A deposit with a third person by way of forfeiture not enough.— A deposit, by each party, of a sum of money with a third person "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so," fails obviously to fall within either the definition of earnest or of part payment, and will not save a contract by parol.[1] And the same is true where each party deposits his check as a forfeiture.[2]

§ 408. The effect of earnest in passing title.— This is a question reserved for future consideration,[3] the only question here being the effect of earnest in giving validity to the contract.

b. Of Part Payment.

§ 409. What the statute requires.— The statute requires the giving of something in part payment. This clearly contemplates a part payment of the purchase price,— something which is to be deducted from the whole amount, and not, like earnest proper, something in addition to it.

§ 410. The amount required.— The statute does not specify the amount to be paid, but clearly any appreciable amount paid and received as a part payment will satisfy the statute.

§ 411. What may be given in part payment.— The statute does not require the payment of money, but of "something" in part payment. Clearly, therefore, anything of value which may be used in payment, and which the parties give and take as such, will suffice.[4] Thus —

§ 412. —— Check.— A check, drawn upon funds and duly paid, will suffice where the parties give and receive it as part

[1] Howe v. Hayward, 108 Mass. 54, 11 Am. R. 306; Jennings v. Dunham, 60 Mo. App. 635.

[2] Noakes v. Morey, 30 Ind. 103.

[3] See *post*, §§ 514, 532.

[4] In Weir v. Hudnut, 115 Ind. 525, 18 N. E. R. 24, Judge Elliott says: "What the parties agree shall constitute payment the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment

payment.[1] So it was held that a check drawn upon a deposit will suffice, although it has not yet been presented for payment.[2]

§ 413. —— **Buyer's note.**— But, inasmuch as a mere promise to pay cannot be regarded as an actual payment, it is clear that the buyer's own note cannot satisfy the statute unless it be received and treated as payment.[3]

§ 414. —— **Note of strangers.**— But the note of a third person, accepted as payment, and not merely as collateral, will suffice.[4]

§ 415. —— **Money already in hands of seller.**— Where money, already in the hands of the seller and due to the buyer upon previous dealings, is agreed by both parties to be retained and applied by the seller as part payment, it will suffice.[5] The parties need not go through the idle ceremony of having the seller pay the money to the buyer in satisfaction of the previous indebtedness, to be immediately returned to the seller as part payment.

may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value." In this case there was a sale of corn, and the parties agreed that sacks delivered by the purchaser to the seller to be used in transporting the corn should constitute a part payment; that is, their use by the seller should be taken as a part satisfaction of the price of the corn. This point of the agreement distinguishes this case from the decision in Hudnut v. Weir, 100 Ind. 501, in which it was shown that the sacks were delivered, but the fact that the value of their service was to be deducted, by agreement of the parties, from the cost of the corn was not made to appear.

[1] Hunter v. Wetsell, 84 N. Y. 549, 38 Am. R. 544.

[2] McLure v. Sherman, 70 Fed. R. 190.

[3] Krohn v. Bantz, 68 Ind. 277; Ireland v. Johnson, 18 Abb. Pr. (N. Y.) 392. The surrender by the buyer of the seller's note previously given is sufficient. Sharp v. Carroll, 66 Wis. 62, 27 N. W. R. 832.

[4] Combs v. Bateman, 10 Barb. (N. Y.) 573.

[5] Dow v. Worthen, 37 Vt. 108.

§ 416. —— Agreement to satisfy previous indebtedness as part payment.— But a mere agreement that the price or a part thereof shall be applied upon a prior indebtedness of the buyer to the seller cannot operate as a payment in whole or in part.[1] In order to satisfy the statute there must be some act, such as a receipt or a discharge, or an indorsement or an entry, by which the application is actually made.[2]

§ 417. —— Payment of seller's debt to third person.— But the actual payment by the buyer to a third person, at the seller's direction, of a debt due from the seller to such third person, is as effectual as a payment to the seller in person.[3]

§ 418. Mere unaccepted part payment not enough.— The payment must clearly be actually made and received, and a proffered payment not accepted is therefore not enough. Thus where the seller wrote that he should stand to the contract, "but shall want you to pay me fifty dollars to bind it," and the buyer at once sent the money in a letter which the seller immediately returned, there was held to be no part payment.[4]

§ 419. When part payment to be made — "At the time." The statute in New York and some other States requires[5] the part payment to be made "at the time" of the contract, and a

[1] Artcher v. Zeh, 5 Hill (N. Y.), 200; Clark v. Tucker, 2 Sandf. (N. Y.) 157; Matthiessen, etc. Co. v. McMahon, 38 N. J. L. 536; Gaddis v. Leeson, 55 Ill. 83; Brabin v. Hyde, 32 N. Y. 519; Mattice v. Allen, 3 Abb. App. Dec. (N. Y.) 248, 3 Keyes, 492.

An agreement that a sum of money, which had been overpaid to the vendor upon previous sales to the same purchaser, should be returned to apply on a later one in question, does not constitute such part payment as satisfies the statute. Norton v. Davison, [1899] 1 Q. B. 401, approving Walker v. Nussey, 16 M. & W. 302.

[2] Gorman v. Brossard (1899), 120 Mich. 611, 79 N. W. R. 903; Clark v. Tucker, *supra;* Walker v. Nussey, 16 M. & W. 302; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. R. 575; Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. R. 825.

[3] Wood on Statute of Frauds, § 294, n.; Brady v. Harrahy, 21 Up. Can. Q. B. 340; Stoddard v. Graham, 23 How. Pr. 518.

[4] Edgerton v. Hodge, 41 Vt. 676; Bowers v. Anderson, 49 Ga. 145.

[5] As in Alabama, Arizona, California, Colorado, Dakota, Idaho, Minnesota, Montana, Nebraska, Nevada, Oregon, Utah, Wisconsin, Wyoming,

payment made subsequently will not suffice, except (1) where the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made on the contract at the request of the seller; or (2) where the parties subsequently come together and substantially restate, reaffirm or renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then a payment is made upon it.[1]

§ 420. ——. A substantial compliance with the statute in this respect suffices. "The statute does not mean rigorously *eo instanti*. It does contemplate that the contract and the payment shall be at the same time in the sense that they constitute parts of one and the same transaction."[2]

Under such a provision, the contract seems to take effect from the date of the part payment, which is the date of what is practically a new contract.[3]

Where, however, the statute does not require payment "at the time," payment made and accepted at any time before action brought would seem to be sufficient;[4] and in such case, by analogy to part receipt,[5] the contract would take effect from its date.

§ 421. **Part payment to agent suffices.**—The payment of part of the purchase price to the seller's agent, if authorized to receive such payment, suffices. Authority to receive such payment may, as in other cases, be conferred either by prior au-

[1] Browne on Stat. Frauds, § 343, n.; Hunter v. Wetsell, 57 N. Y. 375, 15 Am. R. 508; s. c., 84 N. Y. 549, 38 Am. R. 544; Jackson v. Tupper, 101 N. Y. 515; Bates v. Chesebro, 32 Wis. 594, 36 Wis. 636; Paine v. Fulton, 34 Wis. 83; Kerkhof v. Atlas Paper Co., 68 Wis. 674, 32 N. W. R. 766; Crosby Hardwood Co. v. Trester, 90 Wis. 412, 63 N. W. R. 1057; Hanson v. Roter, 64 Wis. 622.

[2] Hunter v. Wetsell, 84 N. Y. 549, 38 Am. R. 544.

[3] Wood on Statute of Frauds, § 294; Bissell v. Balcom, 39 N. Y. 275; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370.

[4] See Thompson v. Alger, 12 Metc. (Mass.) 428; Walker v. Nussey, 16 M. & W. 302, per Parke, B.

[5] Gault v. Brown, 48 N. H. 183, 2 Am. R. 210.

thorization or subsequent ratification,[1] but it cannot be made to depend upon the same verbal agreement which, by such payment, is sought to be sustained.[2]

6. *Of the Note or Memorandum.*

§ 422. What the statute requires.— The statute provides that the agreement for the sale shall not be good in the absence of the acts already referred to, "except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."

There must now be considered, therefore,—

a. What is a note or memorandum.

b. What note or memorandum will suffice.

c. The signing by the parties.

d. The signing by their agents duly authorized.

a. What is a Note or Memorandum.

§ 423. Is distinct from the agreement itself.— And first it may be noticed that the note or memorandum of the agreement is distinct from the agreement itself. If the parties have formally reduced their agreement to writing, there is, of course, no occasion for any further note or memorandum of it. What the statute here refers to is a parol agreement of which some written note or memorandum is made.

§ 424. At what time note or memorandum must be made.— It is not essential that the note or memorandum should be made contemporaneously with the agreement itself.[3] It is sufficient if made at any time before action brought upon the agreement.[4] Whether it may be made after action brought has been thought not so clear. Peters, J., says in one case:[5] "There has been some judicial inclination to favor the doc-

[1] Hawley v. Keeler, 53 N. Y. 114.

[2] Hawley v. Keeler, *supra*.

[3] Sherwood v. Walker, 66 Mich. 568, 11 Am. St. R. 531.

[4] Bill v. Bament, 9 M. & W. 36.

[5] Bird v. Munroe, 66 Me. 337, 22 Am. R. 571.

trine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action although there is a contract. The writing is a condition precedent to the right to sue." And in a recent English case[1] it is held that the writing must exist at the time the action is begun.

§ 425. Form of the note or memorandum.— The statute prescribes no form for the note or memorandum, and it is well settled that no particular form is required, but that any writing, howsoever informal, may suffice, provided always it contains the essential elements of the agreement and is duly signed.[2] Thus —

§ 426. Several papers.— The note or memorandum need not be comprised in a single paper, but may be composed of a number of papers, and they may be made at different times.[3] But unless each paper is properly signed,[4] it is essential that the

[1] Lucas v. Dixon, 22 Q. B. Div. 357.

[2] Mason v. Decker, 72 N. Y. 595, 28 Am. R. 190; Dresel v. Jordan, 104 Mass. 407; Newby v. Rogers, 40 Ind. 9; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Getchell v. Jewett, 4 Greenl. (Me.) 350; Old Colony R. R. Co. v. Evans, 6 Gray (Mass.), 25, 66 Am. Dec. 394; Ivory v. Murphy, 36 Mo. 534; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lowry v. Mehaffy, 10 Watts (Pa.), 387; Douglass v. Spears, 2 N. & McC. (S. C.) 207, 10 Am. Dec. 588; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661.

[3] Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243; Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 8 S. E. R. 8, 2 L. R. A. 212 [and note citing Lerned v. Wannemacher, 9 Allen (Mass.), 412; Rhoades v. Castner, 12 id. 132; Peck v. Vandemark, 99 N. Y. 29; Lee v. Mahony, 9 Iowa, 344; Jelks v. Barrett, 52 Miss. 315; Fisher v. Kuhn, 54 id. 480; Thayer v. Luce, 22 Ohio St. 62; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 447; Parkhurst v. Van Cortland, 14 Johns. (N. Y.) 15]; American Oak Leather Co. v. Porter, 94 Iowa, 117, 62 N. W. R. 658; Fowler Elevator Co. v. Cottrell, 38 Neb. 512, 57 N. W. R. 19; Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. R. 383; Olson v. Sharpless, 53 Minn. 91, 55 N. W. R. 125; Griffiths Co. v. Humber, [1899] 2 Q. B. 414.

[4] In Thayer v. Luce, 22 Ohio St. 62, it is said: "That several writings,

unsigned papers be either physically annexed to the signed paper,[1] or that there be such reference in the signed paper to the unsigned that they may be construed as one instrument.[2] Reference in the unsigned paper to the signed paper is not enough;[3] nor is parol evidence admissible to connect the unsigned to the signed;[4] though if the signed paper contains a clear reference to an unsigned paper, but does not sufficiently

though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the statute of frauds, is fully settled. In such cases, however, the mutual relation of the several writings to the same transaction must appear in the writings themselves, parol evidence being inadmissible for the purpose of showing their connection. If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers that are not so signed; but if the several papers relied on be signed by such party, it is sufficient if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison."

"The connection between them must appear by internal evidence derived from the signed memorandum." Johnson v. Buck, *supra.*

A letter written by an agent, within the scope of his authority, which refers to and recognizes an unsigned document as containing the terms of a contract made by his principal, is sufficient. Griffiths Co. v. Humber, [1899] 2 Q. B. 414.

[1] As by pinning or otherwise fastening them together. Tallman v. Franklin, 14 N. Y. 584.

[2] Coe v. Tough, 116 N. Y. 273 [citing Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; Wright v. Weeks, 25 N. Y. 153; Drake v. Seaman, 97 N. Y. 230; Stone v. Browning, 68 N. Y. 598]; Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243; Griffiths Co. v. Humber, [1899] 2 Q. B. 414.

[3] Thayer v. Luce, 22 Ohio St. 62.

[4] "The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol testimony will be received only for the purpose of interpretation or explanation where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made parts of it." Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243 (citing Boydell v. Drummond, 11 East, 142; Coles v. Trecothick, 9 Ves. 234; Clinan v. Cooke, 1 Sch. & Lefroy, 22; Dobell v. Hutchinson, 3 Ad. & E. 355; Ridgway v. Wharton, 6 H. of L. Cas. 238; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273). See also Brown v. Whipple, 58 N. H. 229; Hinde v. Whitehouse, 7 East, 558; Kenworthy v. Schofield, 2 B. & C. 945.

describe it, it is held that parol evidence may be resorted to to identify the unsigned paper referred to;[1] and where the reference to the unsigned paper is ambiguous, parol evidence may be admitted to solve the ambiguity.[2]

§ 427. ——. But the several papers, though sufficiently connected, must also be consistent and harmonious, for, if they are contradictory or inconsistent, they will clearly be insufficient to satisfy the statute, inasmuch as it would be impossible to determine what the bargain was without the introduction of parol evidence to show which paper stated it correctly.[3]

And so, obviously, when all the papers which are actually annexed or by reference incorporated do not constitute a complete memorandum, they will be insufficient to satisfy the statute.[4]

§ 428. **Letters.**— Letters may be, and constantly are, resorted to for the purpose of supplying the necessary note or memorandum, and they are unquestionably sufficient as such, either alone or in connection with other instruments, if, with-

[1] "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot by supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in Ridgeway v. Wharton, 6 H. L. Cas. 238. There 'instructions' were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine of latent ambiguity." Thesiger, L. J., in Bauman v. James, 3 Ch. 508. To like effect: Long v. Millar, 4 C. P. Div. 450; Cave v. Hastings, 7 Q. B. Div. 125; Shardlow v. Cotterell, 18 Ch. D. 280; Wilkinson v. Taylor Mfg. Co., 67 Miss. 231, 7 S. R. 356; Turner v. Lorillard Co., 100 Ga, 645, 28 S. E. R. 383.

In Oliver v. Hunting, 44 Ch. Div. 205, parol evidence was admitted to show the relations and situation of the parties, from which it appeared that a letter written by one referred to a previous memorandum of sale.

[2] See cases cited in preceding note. See also Ansley v. Green, 82 Ga. 181; Mohr v. Dillon, 80 Ga. 572.

[3] Cooper v. Smith, 15 East, 103; Richards v. Porter, 6 B. & C. 437; Smith v. Surman, 9 B. & C. 561; Archer v. Baynes, 5 Ex. 625.

[4] Taylor v. Smith, [1893] 2 Q. B. 65.

out the aid of parol testimony, the parties, the subject-matter and the terms of the contract may be collected from them.[1] A letter making a proposition and a letter accepting it present a plain case.[2] And even a letter written to repudiate an agreement or countermand an order, the terms of which it stated or referred to, has been held a sufficient memorandum to sustain the agreement.[3]

[1] Austin v. Davis, 128 Ind. 472, 25 Am. St. R. 456; Wills v. Ross, 77 Ind. 1, 40 Am. R. 279; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. R. 800; Francis v. Barry, 69 Mich. 311 (citing Allen v. Bennet, 3 Taunt. 169; Jackson v. Lowe, 1 Bing. 9; Dobell v. Hutchinson, 3 Ad. & E. 355; Jones v. Williams, 7 M. & W. 493; Telegraph Co. v. Railroad Co., 86 Ill. 246; Moore v. Mountcastle, 61 Mo. 424; Abbott v. Shepard, 48 N. H. 14); Beckwith v. Talbot, 2 Colo. 639; Doughty v. Manhattan Brass Co., 101 N. Y. 644; Smith v. Colby, 136 Mass. 562; Linsley v. Tibbals, 40 Conn. 522; Brown v. Whipple, 58 N. H. 229; Jenness v. Mt. Hope Iron Co., 53 Me. 20; Thames, etc. Co. v. Beville, 100 Ind. 309; Mizell v. Burnett, 4 Jones (N. C.), 249, 69 Am. Dec. 744. See also Cunningham v. Williams, 43 Mo. App. 629; Pitcher v. Lowe, 95 Ga. 423, 22 S. E. R. 678.

[2] Gulf, etc. Ry. Co. v. Settegast, 79 Tex. 256; Kenney v. Hews, 26 Neb. 213; Wilkinson v. Taylor Mfg. Co., 67 Miss. 231, 7 S. R. 356.

[3] Drury v. Young, 58 Md. 546, 42 Am. R. 343; Louisville Asphalt Co. v. Lorick, 29 S. C. 533, 2 L. R. A. 212. See also Wilson v. Lewiston Mill Co., 150 N. Y. 314, 44 N. E. R. 959, 55 Am. St. R. 680; Elliott v. Dean, Cab. & El. 283; Martin v. Haubner, 26 Canada Sup. R. 142.

In Louisville Asphalt Varnish Co. v. Lorick, *supra*, defendants gave an order for paint to plaintiff's traveling salesman, who entered it in his book and sent a copy of it to plaintiff. The day after giving the order defendants wrote to plaintiff not to ship paint "ordered through your salesman. We have concluded not to handle it." This letter was not received until plaintiff had shipped the paint. *Held*, that this letter sufficiently referred to the order, which stated the terms, as to furnish a good note or memorandum.

In Bailey v. Sweeting, 9 C. B. (N. S.) 843, the defendant wrote to plaintiff describing the goods he had previously ordered and giving the price, but saying, "Which goods I have never received, and have long since declined to have." *Held*, a sufficient memorandum.

In Wilkinson v. Evans, L. R. 1 C. P. 407, the defendant wrote, on the back of the invoice, a letter to the plaintiff in which he refused the goods because they were badly crushed. *Held*, a sufficient memorandum.

In Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140, the defendant wrote a letter to plaintiff admitting the purchase and referring to the plaintiff's letter containing the invoice, but repudiating any liability, as the goods had been sent by a wrong route. *Held*, sufficient.

See, to same effect, Saunderson v. Jackson, 2 B. & P. 238; Cave v. Hast-

§ 429. Telegrams.— So the note or memorandum may be wholly or partly found in telegrams,[1] provided that they, like other instruments, embrace the essentials of the contract,[2]— a subject more fully discussed in the next subdivision. That telegrams shall have this effect is expressly provided by statute in several of the States,[3] and, in general, telegrams are given the same effect as letters.

§ 430. Books.— So the memorandum may, of course, consist of entries in trade,[4] broker's[5] or private memorandum[6] books, or of writings of any nature, however informal, so long as they possess the necessary requisites.

§ 431. Records of corporate meetings.— Entries in the record books of private and municipal corporations of resolutions and other actions had at corporate meetings, when signed by the clerk and containing the essential elements of the contract, are sufficient to satisfy this requirement of the statute.[7]

§ 432. Not necessary that memorandum be addressed to or pass between the parties.— It is not necessary that the note

ings, L. R. 7 Q. B. Div. 125; Dobell v. Hutchinson, 3 Ad. & E. 355.

But a letter referring to "conditions of sale," but not stating them, is insufficient. Riley v. Farnsworth, 116 Mass. 223.

[1] Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Wells v. Railway Co., 30 Wis. 605; King v. Wood, 7 Mo. 389; Little v. Dougherty, 11 Colo. 103.

[2] Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. R. 898; Whaley v. Hinchman, 22 Mo. App. 483; North v. Mendel, 73 Ga. 400, 54 Am. R. 879; Lincoln v. Erie Preserving Co., 132 Mass. 129.

[3] As in California, Nevada, Oregon and Utah.

[4] Newell v. Radford, L. R. 3 C. P. 52; Vandenbergh v. Spooner, L. R. 1 Ex. 316; Sarl v. Bourdillon, 1 C. B. (N. S.) 188.

[5] Coddington v. Goddard, 16 Gray (Mass.), 436.

[6] Wiener v. Whipple, 53 Wis. 298, 40 Am. R. 775; Champion v. Plummer, 4 B. & P. 252; Allen v. Bennett, 3 Taunt. 169.

[7] Argus Co. v. City of Albany, 55 N. Y. 495, 14 Am. R. 296; Johnson v. Trinity Church, 11 Allen (Mass.), 123; Tufts v. Plymouth Mining Co., 14 Allen (Mass.), 407; Chase v. City of Lowell, 7 Gray (Mass.), 33; Dykers v. Townsend, 24 N. Y. 57.

or memorandum be a writing addressed to or passing between the parties. Thus a letter written by defendant to his own agent,[1] or to his principal,[2] or to a third person,[3] is enough.

b. What Note or Memorandum is Sufficient.

§ 433. The requisites in general.— To satisfy the requirements of the statute, the note or memorandum must, in general terms, contain a statement of all of the essential terms of the contract, naming or describing with reasonable certainty the parties thereto; describing or furnishing reasonably certain means for identifying the property; stating the price, when agreed upon, or showing the data from which it may be ascertained; and setting forth all of the essential terms, as to time and place of payment and delivery, the terms of credit, or other incidents of the agreement.[4] It must also be a note or memorandum of the entire contract and not simply of the major portion of it.[5]

Following this general rule more fully into its details, we have —

§ 434. Parties must be named or described.— And first it may be noticed that the note or memorandum should name both buyer and seller, or describe them with reasonable certainty,[6]

[1] Gibson v. Holland, L. R. 1 C. P. 1; Spangler v. Danforth, 65 Ill. 152; Wood v. Davis, 82 Ill. 311; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. R. 800. *Contra*, Steel v. Fife, 48 Iowa, 99, 30 Am. R. 388.

[2] Peabody v. Speyers, 56 N. Y. 230.

[3] Browne on Stat. Frauds, § 354*a*.

[4] See cases cited in following sections.

[5] Cloud v. Greasley, 125 Ill. 313. So in Sheley v. Whitman, 67 Mich. 397, 34 N. W. R. 879, it was held that a clause in a letter, "you may place the gas fixtures I selected to-day. The dining-room fixtures may as well be changed as talked over with the salesman who showed me the goods. Please put them up in fine shape as promptly as possible," was an insufficient memorandum to satisfy the statute.

[6] Champion v. Plummer, 4 B. & P. 252; Allen v. Bennett, 3 Taunt. 169; Williams v. Lake, 2 E. & E. 349; McElroy v. Seery, 61 Md. 389, 48 Am. R. 110; McGovern v. Hern, 153 Mass. 308, 25 Am. St. R. 632, 10 L. R. A. 815, 26 N. E. R. 861; Lewis v. Wood, 153 Mass. 321, 25 Am. St. R. 634, n., 11 L. R. A. 143, 26 N. E. R. 862; Williams v. Byrnes, 1 Moore, P. C. (N. S.) 154; Vandenbergh v. Spooner, L. R. 1 Exch. 316; Fessenden v. Mussey, 11

and should distinguish the one from the other,[1] and for this purpose parol evidence may be received to show the relation of

Cush. (Mass.) 127; Coddington v. Goddard, 16 Gray (Mass.), 436; Lincoln v. Erie Preserving Co., 132 Mass. 129; Grafton v. Cummings, 99 U. S. 100; Nichols v. Johnson, 10 Conn. 192; Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Ross v. Allen, 45 Kan. 231, 10 L. R. A. 835; Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. R. 1044, 11 L. R. A. 97; Knox v. King, 36 Ala. 367; Clampet v. Bells, 39 Minn. 272; Anderson v. Harold, 10 Ohio, 399; Sabre v. Smith, 62 N. H. 663; Peoria Grape Sugar Co. v. Babcock, 67 Fed. R. 892.

[1] Frank v. Eltringham, 65 Miss. 281, 3 S. R. 665.

A memorandum in a broker's book, unsigned, as follows: "Sold Huguet, for J. Ogden & Co.," etc., does not show who was the seller and who the buyer, Ogden & Co. being the parties alleged to be the buyers. Bailey v. Ogden, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509.

A memorandum as follows: "Bought of W. Plummer," etc., but not signed by anybody, is not sufficient, as it does not show who bought the goods. Champion v. Plummer, 4 Bos. & Pul. 252.

A note of an order given to plaintiffs' traveling salesman, made by him in his memorandum or order-book, as follows: "T. F. Hall & Co., 88 South Charles Street, Baltimore, Maryland," followed by a list of the goods, etc., is not enough, not being signed by any one as seller nor otherwise showing who the seller was. McElroy v. Seery, 61 Md. 389, 48 Am. R. 110.

Three telegrams as follows: "Telegraph how much corn you will sell, with lowest cash price;" answer: "Three thousand cases, one dollar five cents, open one week;" reply: "Sold corn, will see you to-morrow," do not show who the buyer is, and are therefore insufficient. Lincoln v. Erie Preserving Co., 132 Mass. 129.

In Coddington v. Goddard, 16 Gray (Mass.), 436, the memorandum was: "9th. W. W. Goddard to T. B. Coddington & Co., 20,000 pounds Chili pig copper," etc. Said the court: "It is objected that the memorandum made by the broker in the present case was insufficient to take the case out of the operation of the statute, because it does not show who were the vendor and vendee of the merchandise. This would be a fatal objection if it were well founded; for although a memorandum of this nature may be very brief, it must nevertheless show with reasonable certainty who were the parties to the contract, and the terms of the sale, so that they may appear from the writing itself. But in the present case the entry is perfectly intelligible and free from doubt. If it is read with reference to the book in which it is made, as an entry by a broker in the regular course of his business as an agent of third parties for the purchase and sale of goods, it clearly indicates a sale from defendant to the plaintiff. It is susceptible of no other interpretation."

In Butler v. Thompson, 92 U. S. 412, it was held that a memorandum as follows: "Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thompson & Co., New York," etc., was a sufficient memorandum not only of the obligation of Butler & Co. to sell,

the parties.[1] They need not be expressly named. It is enough that they are described, and in that case parol evidence is admissible to apply the description and identify the persons meant.[2] But where the parties are neither named nor so described, parol evidence is not admissible to show who they were.[3]

§ 435. —— What description sufficient.— Merely to refer to the persons selling as vendors is not enough,[4] though a description by the term "proprietor,"[5] or "trustee selling under a

but also of the reciprocal obligation of Thompson & Co. to buy.

[1] In Newell v. Radford, L. R. 3 C. P. 52, the memorandum was as follows: "Mr. H. 32 sacks culasses at 39s., 280 lbs., to wait orders," signed "John Williams." It was objected that this was insufficient as not showing who was purchaser and who was seller. Parol evidence was allowed of the situation of the parties, that Williams was defendant's agent and made the entry in plaintiff's book. "The plaintiff," said the court, "was a baker, who would require flour, and the defendant was a person who was in the habit of selling it," and the memorandum was held sufficient.

In Salmon Falls Mfg. Co. v. Goddard, 55 U. S. (14 How.) 446, the memorandum was:

"Sept. 19—W. W. Goddard, 12 mos.
300 bales S. F. drills - 7¼
100 cases blue do - 8¼
R. M. M.
W. W. G."

Parol evidence was permitted that "R. M. M." signed for M. & S., who were agents of plaintiff, and that Goddard signed "W. W. G.," and the memorandum was held good. Two judges dissented. But this use of parol proof was criticised in Grafton v. Cummings, 99 U. S. 100, and declared to be "clearly in conflict with the general current of authority" in Mentz v. Newwitter, *post.*

In Sanborn v. Flagler, 9 Allen, 474, Adams' Cas. 685, the note began, "Will deliver S. R. & Co.," and was signed "J. H. F., J. B. R." Parol evidence was admitted that J. B. R. was one of the partners in S. R. & Co., and signed for them, and that J. H. F. were the initials of Flagler. *Held* sufficient.

[2] McGovern v. Hern, 153 Mass. 308, 25 Am. St. R. 632, 10 L. R. A. 815, 26 N. E. R. 861, citing Jones v. Dow, 142 Mass. 130, 140; Catling v. King, 5 Ch. Div. 660; Rossiter v. Miller, L. R. 3 App. Cas. 1124, 1141, 5 Ch. Div. 648.

Where the parties are referred to by fictitious names, parol evidence is admissible to identify them. Bibb v. Allen, 149 U. S. 481, 496.

[3] Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. R. 1044, 11 L. R. A. 97, 19 Am. St. R. 514; North v. Mendel, 73 Ga. 400, 54 Am. R. 879. (In this case the entry was, "Sold account of C. H. North & Co., Mendel," etc. The word "Mendel" was said to mean the firm of "M. Mendel & Brother," but the court said that could only be made apparent by resort to parol evidence, which was inadmissible, and the memorandum was therefore held insufficient.)

[4] McGovern v. Hern, 153 Mass. 308, 25 Am. St. R. 632, 10 L. R. A. 815; Potter v. Duffield, L. R. 18 Eq. 4.

[5] Sale v. Lambert, L. R. 18 Eq. 1; Rossiter v. Miller, 5 Ch. Div. 648.

trust for sale,"[1] has been held sufficient, because it is always possible in such cases to ascertain from the records who the parties are who answer the description. But, as is said by Sir G. Jessel, M. R., "the court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury could not identify, for, as I understand it, at law that would be a question for a jury."[2]

It is not necessary that the christian name or the initials be given, but a party is sufficiently described as "Mr. Lee." This is, at most, a latent ambiguity, which may be resolved by parol.[3]

§ 436. —— **Agent named instead of principal.**— It is no objection to the sufficiency of the memorandum that the party named therein as buyer or seller is but an agent of the real party in interest, as the latter may always sue or be sued on the contract made by his agent in his behalf.[4] But the mere fact that certain persons are named in the memorandum of sale as auctioneers does not sufficiently show that they are agents of the sellers within this rule.[5]

§ 437. **Goods sold must be stated or described.**— The note or memorandum must also show what goods were sold and in what quantities. This rule requires that the goods sold shall be set out either by name or by such description as will enable them to be ascertained without other recourse to parol evidence than to identify the goods or apply the description to them.[6]

[1] Catling v. King, 5 Ch. Div. 660.

[2] In Commins v. Scott, L. R. 20 Eq. 11.

[3] Lee v. Cherry, 85 Tenn. 707, 4 Am. St. R. 800.

[4] Mechem on Agency, §§ 429, 701; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446; Gowen v. Klous, 101 Mass. 449; Sanborn v. Flagler, 9 Allen (Mass.), 474; McGovern v. Hern, 153 Mass. 308, 25 Am. St. R. 632, 10 L. R. A. 815.

[5] McGovern v. Hern. *supra.*

[6] North v. Mendel, 73 Ga. 400, 54 Am. R. 879: Clampet v. Bells, 39 Minn. 272; Waterman v. Meigs, 4 Cush. (Mass.) 497; May v. Ward. 134 Mass. 127: New England Dressed Meat & Wool Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. R. 112, 52 Am. St. R. 516; Pulse v. Miller, 81 Ind. 190; Holmes v. Evans, 48 Miss. 247, 12 Am. R. 372; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. R. 37; Heffron

§ 438. The price must be shown.— The price also is an essential element, and, where it has been fixed, the note or memorandum must show the price or furnish the data from which it may be ascertained;[1] otherwise it must appear that the price

v. Armsby, 61 Mich. 505, 28 N. W. R. 672; Peoria Grape Sugar Co. v. Babcock, 67 Fed. R. 892.

In North v. Mendel, *supra*, the memorandum was: "Sold account of C. H. North & Co., Mendel, 5 bellies 8." The words "5 bellies 8" were alleged to mean five boxes of pork bellies at eight cents per pound. *Held*, insufficient.

In New England Dressed Meat & Wool Co. v. Worsted Co., *supra*, the memorandum was: "Bought of New Eng. D. M. & W. Co. about 2000 to 2500 lbs. F C and all they make for thirty days." The court said: "The most doubtful question arising on the memorandum is whether the words 'about 2000 to 2500 lbs. F C,' taken in connection with the words following, 'and all they make for thirty days,' etc., is a sufficient designation of the property sold. The rule is that the goods must be designated in the writing, and cannot be shown by parol. . . . But we have no doubt that the meaning of the letters 'F C,' which are technical abbreviations used in the wool trade, may be shown by parol, as well when they appear in a memorandum relied on under the statute of frauds as in any other writing. Where parol evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply the contract to the subject-matter. Upon this point the decision in Macdonald v. Longbottom, 1 El. & El. 987, which was concurred in by all the judges sitting in the exchequer chamber, is an authority which fully covers the present case. When it is shown who and where the parties were at the time of making the contract, and what property the plaintiff had on hand of the kind described, it is clear, without more, that the memorandum referred to the 2,443 pounds of wool on hand recently manufactured and to the additional amount which might be manufactured within the thirty days. See Mead v. Parker, 115 Mass. 413; Hurley v. Brown, 98 Mass. 545; Scanlan v. Geddes, 112 Mass. 15; Slater v. Smith, 117 Mass. 96; Nichols v. Johnson, 10 Conn. 192; Waring v. Ayres, 40 N. Y. 357; Colerick v. Hooper, 3 Ind. 316."

A telegram to a hop dealer, by his agent W., stating: "Bought thirteen at eleven five-eighths net you; confirm purchase by wire to B.;" with a reply by the dealer sent to B.: "We confirm purchase W. eleven five-eight cent, like sample," constitute a sufficient memorandum, where it can be shown by parol evidence that, according to the usages of the hop business, the words were understood by the parties to mean an agreement to purchase a certain quantity of hops of a certain grade for a certain price. Brewer v. Horst-Lachmund Co. (1900), 127 Cal. 643, 60 Pac. R. 418.

[1] Hanson v. Marsh, 40 Minn. 1 (citing Elmore v. Kingscote, 5 B. & C.

was left to be determined afterward, as by the market or reasonable value, or by valuers, or the like,[1]— methods which have already been considered.[2]

§ 439. Terms of credit or particular mode of payment must be stated.— Where no terms of credit are agreed upon, the sale will be deemed to be one for cash on delivery, and this therefore need not be stated.[3] But where a term of credit is agreed upon, or a particular mode or time of payment is fixed, it is an essential element of the sale, and a memorandum which does not state the fact is insufficient.[4]

§ 440. Time and place of delivery, if agreed upon, must be stated.— It is not essential to a contract of sale that the time or place of delivery should be stipulated, but, if they are ex-

583; Acebal v. Levy, 10 Bing. 376; Goodman v. Griffiths, 1 H. & N. 574; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Waterman v. Meigs, 4 Cush. (Mass.) 497; Ashcroft v. Butterworth, 136 Mass. 511; Stone v. Browning, 68 N. Y. 598; James v. Muir, 33 Mich. 223); Smith v. Arnold, 5 Mason (U. S. C. C.) 414; Phelps v. Stillings, 60 N. H. 505; Adams v. McMillan, 7 Port. (Ala.) 73; Soles v. Hickman, 20 Pa. St. 180; Sabre v. Smith, 62 N. H. 663; Heffron v. Armsby, 61 Mich. 505, 28 N. W. R. 672; Peoria Grape Sugar Co. v. Babcock, 67 Fed. R. 892; Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. R. 383; Reid v. Diamond Plate Glass Co., 54 U. S. App. 619, 29 C. C. A. 110, 85 Fed. R. 193. See also Webster v. Brown, 67 Mich. 328.

[1] Valpy v. Gibson, 4 C. B. 837; Hoadly v. McLaine, 10 Bing. 482; Ashcroft v. Morrin, 4 M. & G. 450; O'Neil v. Crain, 67 Mo. 250.

[2] See *ante*, §§ 207–213.

[3] Wood on Stat. Frauds, p. 656.

[4] Browne on Stat. Frauds, § 382 [citing Morton v. Dean, 13 Metc. (Mass.) 385; Davis v. Shields, 26 Wend. (N. Y.) 341; McFarson's Appeal, 11 Pa. St. 503; Soles v. Hickman, 20 Pa. St. 180; Buck v. Pickwell, 27 Vt. 157]; Norris v. Blair, 39 Ind. 90, 10 Am. R. 135; Wardell v. Williams, 62 Mich. 50, 28 N. W. R. 796, 4 Am. St. R. 814; Lester v. Heidt, 86 Ga. 226, 10 L. R. A. 108, 12 S. E. R. 214.

In Norris v. Blair the sale was upon a term of credit of nine months, by giving note with security and waiving valuation and appraisement laws, but the memorandum did not show this; *held*, insufficient. In Wardell v. Williams a part of the purchase was to be secured by a mortgage to contain a clause authorizing the release of lots on the payment of a valuation, but the memorandum did not show the valuation; *held*, insufficient. In Lester v. Heidt the memorandum stated the price to be cash on terms agreed upon, but did not state the terms; *held*, insufficient.

pressly agreed upon, they thus become material parts of the agreement, and a note or memorandum which does not include them is defective.[1]

§ 441. All other material terms must be included.— And the note or memorandum must also contain any other special terms or conditions, such as a right of rejection if not approved,[2] or a special warranty,[3] which the parties have made a part of their contract. It is not enough that it is a note or memorandum of the greater part of the contract: it must be a note or memorandum of the whole of it.[4]

§ 442. Consideration need not be stated unless required by statute.— The statute in some cases, as in Oregon, expressly requires that the consideration of the contract must be expressed in the note or memorandum, and such a requirement must, it is held, be complied with to render the note or memorandum sufficient.[5] In several of the statutes it is expressly declared that the consideration need not be stated. In the majority of the States, however, the statute is silent upon the subject, but it is quite universally held in such cases that the statement of the consideration is not essential.

§ 443. Memorandum must show complete contract.— Inasmuch as it is the note or memorandum which gives the prior parol contract its legal force, it follows that to make a complete contract it is essential that the note or memorandum must be complete. Thus, it is essential that the terms be agreed upon with certainty, and that the parties assent to the same thing in the same sense;[6] and if it appears from the note or

[1] Browne, Stat. Frauds, § 384 [citing Davis v. Shields, *supra;* Gault v. Stormont, 51 Mich. 638, 17 N. W. R. 214; Smith v. Shell, 82 Mo. 215, 52 Am. R. 365 (followed in Lehenbeuter Co. v. McCord, 65 Mo. App. 507); Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446; Kriete v. Myer, 61 Md. 558].

[2] Boardman v. Spooner, 13 Allen (Mass.), 353, 90 Am. Dec. 196.

[3] Peltier v. Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Newberry v. Wall, 65 N. Y. 484.

[4] Cloud v. Greasley, 125 Ill. 313.

[5] Corbitt v. Salem Gas Light Co., 6 Oreg. 405, 25 Am. R. 541.

[6] Breckinridge v. Crocker, 78 Cal. 529; Oakman v. Rogers, 120 Mass. 214.

memorandum that this has not been done, or that some of the terms have not yet been settled,[1] or if the note or memorandum refer to other terms agreed upon than those stated,[2] such a note or memorandum will fail to establish an enforceable agreement.

§ 444. Memorandum must import a sale.— The memorandum must, moreover, be such as to import a sale, rather than some other agreement or arrangement. Thus, where the contract asserted was a sale of four car-loads of corn, but the memorandum relied upon was: "We can spare you four car-loads of corn. If nothing prevents, can load cars in about two weeks," the court held it insufficient; saying that the word "spare" did not necessarily or usually import a sale; and that a memorandum, in order to suffice, must, "in its very terms, import a sale, and it must contain all the essential parts of the bargain, and they must be clearly deducible from it without resort to the parol agreement."[3]

§ 445. Parol evidence not admissible to supply deficiencies. It must also be kept in mind, as has frequently been stated in the preceding sections, that parol evidence is not admissible to supply deficiencies or omissions in the note or memorandum.[4] It may be resorted to, to apply descriptions, to aid identification, or to explain a latent ambiguity, but farther than this it cannot go.

§ 446. Parol evidence not admissible to contradict complete note or memorandum made by both parties.— So, on the other hand, where the parties have deliberately made and

[1] Wardell v. Williams, 62 Mich. 50, 4 Am. St. R. 814; May v. Ward, 134 Mass. 127, where memorandum referred to essential terms "to be agreed upon."

[2] Riley v. Farnsworth, 116 Mass. 223, where memorandum referred to the "conditions of sale," but did not state them.

[3] Redus v. Holcomb (1900), — Miss. —, 27 S. R. 524.

[4] See American Oak Leather Co. v. Porter, 94 Iowa, 117, 62 N. W. R. 658; Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. R. 898; Wilson v. Lewiston Mill Co., 150 N. Y. 314, 44 N. E. R. 959, 55 Am. St. R. 680; Frank v. Eltringham, 65 Miss. 281; Rector

delivered a note or memorandum of their contract, as and for a complete statement of its essential terms, and such note or memorandum is capable of a clear and intelligible interpretation, it must be regarded, like other written contracts, as the final repository of their agreement and conclusive between them; and parol evidence is therefore inadmissible to contradict or vary its terms or construction.[1]

§ 447. ——. Thus it is not competent, by parol, to add to or vary the terms of the contract by showing a particular time for payment or delivery, no time being mentioned;[2] or to show that the sale was by sample where that did not appear;[3] or to change the place[4] or time[5] of delivery fixed by the contract; or to prove the existence[6] or the waiver[7] of a warranty; or a modification of a stipulation as to valuation;[8] or to relieve one party from personal obligation by showing that he was simply the agent of another person, though parol evidence might be admissible to charge that other also.[9]

Provision Co. v. Sauer, 69 Miss. 235, 13 S. R. 623; Redus v. Holcomb, — Miss. —, 27 S. R. 524.

[1] Williams v. Robinson, 73 Me. 186, 40 Am. R. 352 [citing Small v. Quincy, 4 Me. 497; Coddington v. Goddard, 16 Gray (Mass.), 436; Hawkins v. Chace, 19 Pick. (Mass.) 502; Ryan v. Hall, 13 Metc. (Mass.) 520; Warren v. Wheeler, 8 Metc. (Mass.) 97; Cabot v. Winsor, 1 Allen (Mass.), 546; Remick v. Sandford, 118 Mass. 102]; Wiener v. Whipple, 53 Wis. 298, 40 Am. R. 775 [citing Meyer v. Everth, 4 Camp. 22; Gardiner v. Gray, 4 Camp. 144]; Harrison v. McCormick, 89 Cal. 327, 26 Pac. R. 830, 23 Am. St. R. 469; Thompson v. Libby, 34 Minn. 374, 26 N. W. R. 1; McQuaid v. Ross, 77 Wis. 470; Gilbert v. Stockman, 76 Wis. 62, 44 N. W. R. 845, 20 Am. St. R. 23; State v. Hoshaw, 98 Mo. 358; Hills v. Rix, 43 Minn. 543, 46 N. W. R. 297; Burch v. Augusta R. R. Co., 80 Ga. 296; Hill v. Blake, 97 N. Y. 216.

[2] Williams v. Robinson, 73 Me. 186, 40 Am. R. 352.

[3] Wiener v. Whipple, 53 Wis. 298, 40 Am. R. 775; Harrison v. McCormick, 89 Cal. 327, 26 Pac. R. 830, 23 Am. St. R. 469; Meyer v. Everth, 4 Camp. 22.

[4] Moore v. Campbell, 10 Ex. 323; Stowell v. Robinson, 3 Bing. N. C. 928; Marshall v. Lynn, 6 M. & W. 109; Stead v. Dawber, 10 A. & E. 57.

[5] Noble v. Ward, L. R. 1 Ex. 117.

[6] Thompson v. Libby, 34 Minn. 374.

[7] Goss v. Nugent, 5 B. & Ad. 58.

[8] Harvey v. Grabham, 5 A. & E. 61.

[9] Bulwinkle v. Cramer, 27 S. C. 376, 3 S. E. R. 776, 13 Am. St. R. 645; Higgins v. Senior, 8 M. & W. 834; Nash v. Towne, 5 Wall. (U. S.) 689; Jones v. Littledale, 6 Ad. & E. 486; Mechem on Agency, §§ 429, 701.

§ 448. But defendant may show note or memorandum set up by plaintiff to be incomplete.— But the rule of the last section does not conflict with that which permits a defendant to show by parol that the note or memorandum relied upon by the plaintiff is not a note or memorandum of any previous parol agreement at all,[1] or that it is a note or memorandum of but a part of such agreement.[2] The rule of the last section precludes the admission of parol evidence to add to, contradict or vary the written agreement deliberately entered into by both parties, as being in itself their agreement and not merely as a memorandum at a previous parol agreement upon which they rely. The rule of the present section permits the defendant to show that what is set up as such a note or memorandum as will render the previous parol agreement enforceable is not a complete note or memorandum of that agreement. The distinction is between impeaching a written agreement upon which the party relies and impeaching a note or memorandum of the previous parol agreement upon which he relies.[3]

[1] Pym v. Campbell, 6 E. & B. 370; Wake v. Harrop, 6 H. & N. 768; Hussey v. Horne-Payne, 4 App. Cas. 311, p. 320; Coddington v. Goddard, 16 Gray (Mass.), 436.

[2] Pitts v. Beckett, 13 M. & W. 743; Elmore v. Kingscote, 5 B. & C. 583; Goodman v. Griffiths, 1 H. & N. 574; Acebal v. Levy, 10 Bing. 376; Coddington v. Goddard, *supra;* Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. R. 383.

[3] See Williams v. Robinson, 73 Me. 186, 40 Am. R. 352; Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. R. 383; Wiener v. Whipple, 53 Wis. 298, 40 Am. R. 775. In Coddington v. Goddard, *supra*, the defendant sought to show that a broker's memorandum of an alleged sale was not a memorandum of the bargain as made. The court held that the broker was a special agent and had no authority to bind the defendant except as authorized by him, and that parol evidence was admissible to show what the authority was. Said the court: "It would seem to follow as a necessary consequence that evidence of the verbal agreement into which the defendant entered for the sale of the copper was competent and material on the question of the extent of his authority to bind the defendant. Nor does the admission of this evidence for this purpose at all contravene the rule that parol proof is incompetent to vary or control a written contract. It is offered for a wholly different purpose. It bears solely on a preliminary inquiry. The object is not to explain or alter a contract, but to show that no contract was ever entered into, because the person who executed it had no authority to make it. The authority

c. Of the Signing of the Parties.

§ 449. Whether signing by both parties necessary.— The language of the statute usually is that the note or memorandum shall be signed by the *party* to be charged thereby, though the English statute used the word *parties*. Some importance has, at times, been attached to the use of the plural form, but, though a strong *a priori* argument might be made that both parties are to be charged or bound by the agreement, it is now well settled by the preponderance of authority that the note or memorandum need be signed only by the party against whom it is to be enforced and that the want of mutuality is no objection.[1] On the other hand, where the contract consists of mutual promises, it is held in some cases that though the party to be charged has signed, yet if the party bringing the action has not signed and consequently could not be compelled to per-

of an agent may always be shown by parol; but the contracts into which he enters within the scope of his authority, when reduced to writing, can be proved only by the writing itself. The necessity of admitting evidence of the verbal contract entered into with a broker, in cases where his authority is drawn in question, is quite obvious. If such proof were incompetent, a broker who had entered into negotiations with a person might make a memorandum of a contract wholly different from that which he was authorized to sign, and thereby effectually preclude all proof that no such contract was ever made. Allen v. Pink, 4 M. & W. 140; Pitts v. Beckett, 13 M. & W. 743, 750."

[1] Allen v. Bennet, 3 Taunt. 169; Thornton v. Kempster, 5 Taunt. 786; Laythoarp v. Bryant, 2 Bing. N. C. 735; Old Colony R. R. Corp. v. Evans, 6 Gray (Mass.), 25, 66 Am. Dec. 394; Williams v. Robinson, 73 Me. 186, 40 Am. R. 352; Smith's Appeal, 69 Pa. St. 474; Tripp v. Bishop, 56 Pa. St. 424; Perkins v. Hadsell, 50 Ill. 216; Ide v. Leiser, 10 Mont. 5, 24 Am. St. R. 17; Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87; Clason v. Bailey, 14 Johns. (N. Y.) 484; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Richards v. Green, 23 N. J. Eq. 536; Sabre v. Smith, 62 N. H. 663; Case Threshing Mach. Co. v. Smith, 16 Oreg. 381, 18 Pac. R. 641; Mason v. Decker, 72 N. Y. 595, 28 Am. R. 190; Gartrell v. Stafford, 12 Neb. 545, 41 Am. R. 767; Shirley v. Shirley, 7 Blackf. (Ind.) 452; Douglass v. Spears, 2 N. & McC. (S. C.) 207, 10 Am. Dec. 588; Morin v. Martz, 13 Minn. 191; Anderson v. Harold, 10 Ohio, 399; Lowber v. Connit, 36 Wis. 176; Ivory v. Murphy, 36 Mo. 534; De Cordova v. Smith, 9 Tex. 129, 58 Am. Dec. 136; Cunningham v. Williams, 43 Mo. App. 629.

form on his part, there is such a lack of mutuality in the contract as renders it binding upon neither.[1]

§ 450. —— Written offer accepted by parol.— In accordance with the prevailing rule it is held that if one party makes, in writing signed by him, an offer to buy or sell personal property, the person to whom such offer is made may accept it by parol, and after such an acceptance may enforce the agreement against the person signing.[2]

§ 451. How sign.— The party signing may write his name in full or in part;[3] he may use his initials only;[4] he may make his mark,[5] or any sign which is intended to denote his signature;[6] he may touch the pen while some one else guides it;[7] or he may sign his name through the medium of a third person who writes it in his presence and by his express direction.[8] A mere de-

[1] Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. R. 708.

[2] Justice v. Lang, 42 N. Y. 493, 1 Am. R. 576, 52 N. Y. 323; Mason v. Decker, 72 N. Y. 595, 28 Am. R. 190; Case Threshing Mach. Co. v. Smith, 16 Oreg. 381; Dressel v. Jordan, 104 Mass. 407.

[3] Thus the omission of a middle name or initial is not fatal (Fessenden v. Mussey, 11 Cush., Mass., 127), nor is the signing only by the first name. Zann v. Haller, 71 Ind. 136, 36 Am. R. 193.

[4] Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446, where the party signed "R. R. M.;" Sanborn v. Flagler, 9 Allen (Mass.), 474, where the party signed "J. B. F."

[5] Baker v. Dening, 8 A. & E. 94; Zimmerman v. Sale, 3 Rich. (S. C.) 76; Foye v. Patch, 132 Mass. 105; Brown v. McClanahan, 9 Baxt. (Tenn.) 347.

[6] Thus the use of the figures "1, 2, 8" will suffice where the party intends that as his signature. Brown v. Butchers' Bank, 6 Hill (N. Y.), 443, 41 Am. Dec. 755. Nelson, C. J., says that "a party may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name and he intend to bind himself." See also Palmer v. Stephens, 1 Denio (N. Y.), 471; Brainerd v. Heydrick, 32 How. Pr. (N. Y.) 97; McIntire v. Preston, 5 Gilm. (Ill.) 48, 48 Am. Dec. 321; Hascall v. Life Ass'n, 5 Hun (N. Y.), 151; Dewitt v. Walton, 9 N. Y. 571; David v. Insurance Co., 83 N. Y. 265, 38 Am. R. 418; Bickley v. Keenan, 60 Ala. 293.

[7] Helshaw v. Langley, 11 L. J. Ch. (N. S.) 17.

[8] Mechem on Agency, § 96; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Frost v. Deering, 21 Me. 156; Bird v. Decker, 64 Me. 550; Nye v. Lowry, 82 Ind. 316; Croy v. Busenbark, 72 Ind. 48; McMurtry v. Brown, 6 Neb. 368. *Contra*, Simpson v. Commonwealth, 89 Ky. 412, 12 S. W. R. 630.

scription of himself as "your father" is not enough,[1] but a fictitious name[2] or mark, adopted as a signature,[3] will suffice.

The party may sign the note or memorandum at the beginning, in the body, or at the end of it.[4] He may use a pencil,[5]

[1] Selby v. Selby, 3 Meriv. 2.

[2] Thus, see fourth note to this section. So one who has a French name may use the English translation of it, as where one Couture wrote his name Seam. Augur v. Couture, 68 Me. 427.

[3] See fourth note to this section.

[4] Knight v. Crockford, 1 Esp. 190; Lemayne v. Stanley, 3 Lev. 1; Saunderson v. Jackson, 2 B. & P. 238; Coddington v. Goddard, 16 Gray (Mass.), 436; Saunders v. Hackney, 10 Lea (Tenn.), 194. In Drury v. Young, 58 Md. 546, 42 Am. R. 343; Schneider v. Norris, 2 M. & S. 286, and Saunderson v. Jackson, a printed name at the head of the memorandum was held good. In Johnson v. Dodgson, 2 M. & W. 653, the defendant himself wrote the terms of the bargain in his own book, beginning, "Sold John Dodgson," and the seller signed it. *Held*, that this was a sufficient signing by Dodgson to bind him. Lord Abinger said: "The cases have decided that though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." So if C D writes, "A B bought of C D," etc., this is a good signature by C D personally or by his authorized agent. Hawkins v. Chace, 19 Pick. (Mass.) 502. In California Canneries Co. v. Scatena, 117 Cal. 447, 49 Pac. R. 462, it was held that the writing of the name across the face of the memorandum was a sufficient signature and subscription to satisfy the statute, the party intending thereby to signify his intent to accept and be bound by the contract. If it appears in the body of the memorandum, it is enough. New Eng. etc. Meat Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. R. 112, 52 Am. St. R. 516. In Durrell v. Evans, 1 H. & C. 174, Lord Blackburn said: "If the matter were *res integra*, I should doubt whether a name printed or written at the head of a bill of parcels was such a signature as the statute contemplated; but it is now too late to discuss that question. If the name of the party to be charged is printed or written on a document, intended to be a memorandum of the contract, either by himself or his authorized agent, according to Schneider v. Norris (*supra*), and Saunderson v. Jackson (*supra*), it is his signature, whether it is at the beginning or middle or foot of the document. In Johnson v. Dodgson (*supra*), the memorandum was retained by the defendant in his own possession, but as it contained his name, and was intended to be a note of the contract, it was held binding on him, although the fact of his keeping it was a clear indication that he never intended it as a voucher of his being bound, but only to bind the other party."

[5] Geary v. Physic, 7 D. & R. 653, 5 B. & C. 234.

or a stamp,[1] or may use and adopt a printed signature.[2] The question in every case, where a substituted form of signing is adopted, is whether by that form the party intended to be bound, and this is usually a question of fact.

But the party must sign the memorandum which is to be binding on him, and hence where the memorandum was in two parts, and each party signed the one which the other ought to have signed, it was held insufficient.[3]

a. Of the Signing by Agent.

§ 452. Who may be agent.— It is a general rule that any person who has sufficient capacity to act for himself is competent to act as the agent of another; but the rule may be stated still more broadly, for many persons are competent to act for others who would not be competent to bind themselves, such as infants and married women, and it is often said that any person may be an agent except a lunatic, imbecile or child of tender years.[4]

As a rule a person cannot at the same time be both a party to the transaction and the agent of the opposite party;[5] though with the full knowledge and consent of the opposite party there is no legal incapacity to so act.[6]

[1] Bennett v. Brumfitt, L. R. 3 C. P. 28. But it must appear that it was the intention to adopt this as his signature. Boardman v. Spooner, 13 Allen (Mass.), 353, 90 Am. Dec. 196; Wood on Statute of Frauds, § 412.

[2] Grieb v. Cole, 60 Mich. 397. "It is a sufficient signing if the name be in print, and in any part of the instrument, provided that the name is recognized and appropriated by the party to be his. Drury v. Young, 58 Md. 546, 42 Am. R. 343. In this case the defendants wrote the note or memorandum on one of their printed letter-heads containing their firm and individual names, but did not sign it. *Held*, sufficient, as they thereby adopted the printed heading as their signature. To the same effect: Schneider v. Norris, 2 M. & S. 286; Saunderson v. Jackson, 2 B. & P. 238; Tourret v. Cripps, 48 L. J. Ch. 567.

[3] Canterberry v. Miller, 76 Ill. 355.

[4] Mechem on Agency, § 57.

[5] Mechem on Agency, § 68. One party to the contract cannot, therefore, be the agent of the other to bind the latter by signing the memorandum. Sharman v. Brandt, L. R. 6 Q. B. 720; Wilson v. Lewiston Mill Co., 150 N. Y. 314, 44 N. E. R. 959, 55 Am. St. R. 680.

[6] Mechem on Agency, § 68.

§ 453. **How appointed.**— The language of the fourth section of the statute requires that, as to interests in land, the authority of the agent shall be conferred by writing, but no such requirement is found in the seventeenth section. That the agent must be "thereunto lawfully authorized" is the only requirement. The power of the agent, therefore, in this case may be conferred in the same manner as in other cases — either by a prior authorization, express or implied,[1] or by a subsequent ratification.[2] Evidence of such a ratification would be found, for example, where the principal afterward adopted and delivered a memorandum made by another, as a memorandum of his agreement.[3]

It is not essential that the agent shall be specially authorized to sign the memorandum; here, as elsewhere, it is sufficient if the making of such a memorandum falls within the general scope of his authority.[4]

§ 454. —— **Several owners acting in unison — One as agent for all.**— But though owners of several interests are acting in unison, one has not thereby any implied power to bind the others; and the mere fact that one has, in writing, expressed his willingness to sell if the others did, gives no authority to the others to bind him, and this writing does not constitute such a memorandum as will defeat the statute.[5]

§ 455. **How sign.**— The appropriate manner for an agent to sign is to write his principal's name, followed by such a statement as indicates that it was done by him as agent; as, A B by C D, his agent; or, for A B, C D agent, etc.[6] But though these forms are appropriate they are not indispensable, and the agent may sign his principal's name alone,[7] or his own name

[1] See Mechem on Agency, §§ 80–106.

[2] Mechem on Agency, § 145; Maclean v. Dunn, 4 Bing. 722; Soames v. Spencer, 1 Dowl. & R. 32.

[3] Hawkins v. Chace, 19 Pick. (Mass.) 502.

[4] Griffith Co. v. Humber, [1899] 2 Q. B. 414.

[5] Tompkins v. Sheehan (1899), 158 N. Y. 617, 53 N. E. R. 502.

[6] See Mechem on Agency, § 432.

[7] See Mechem on Agency, §§ 427–429; Hawkins v. Chace, 19 Pick.

alone.[1] So he may sign his name in full or in part,[2] or may use his initials only.[3]

§ 456. —— **Where.**— Unless the statute requires the signature to be at the end — and the word "subscribed" has been held to amount to such a requirement,[4] — the agent's signature may be in any part of the memorandum, provided it was intended to have effect as such.[5]

(Mass.) 502; Clason v. Bailey, 14 Johns. (N. Y.) 484; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54.

But in Simpson v. Commonwealth, 89 Ky. 412, 12 S. W. R. 630, the court held that the signing by the agent, in the principal's presence and by his direction, of the principal's name alone, was neither a signing by the principal nor the agent within the meaning of the statute.

[1] Wiener v. Whipple, 53 Wis. 298, 40 Am. R. 775; Trueman v. Loder, 11 Ad. & El. 589, 594; Higgins v. Senior, 8 M. & W. 840; Stowell v. Eldred, 39 Wis. 614; Huntington v. Knox, 7 Cush. (Mass.) 371.

[2] See *ante*, § 451.

[3] Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446.

[4] Davis v. Shields, 26 Wend. (N. Y.) 341; James v. Patten, 6 N. Y. 9, 55 Am. Dec. 376; In re Clifford, 2 Saw. (U. S. C. C.) 428.

[5] In Hawkins v. Chace, 19 Pick. (Mass.) 502, it is said: "Two things may be conceded, as well settled by authorities: (1) that to constitute a signing within the meaning of the statute of frauds, it is not necessary that the signatures be placed at the bottom, but if the party to be charged has inserted his name in any part of the paper, in his own handwriting, it is sufficient to give it effect (Saunderson v. Jackson, 2 Bos. & Pul. 238; Knight v. Crockford, 1 Esp. 190; Penniman v. Hartshorn, 13 Mass. 87); and (2) that the authority of one person to sign for another need not itself be proved by other evidence, but may well be proved by parol evidence."

Thus, a memorandum in this form: "W. H. Hawkins & Co., Bought of William H. Chace," etc., is sufficiently signed by Chace if written by an authorized agent. Hawkins v. Chace, *supra*.

So a memorandum, by an authorized agent, in this form: "Bought for Isaac Clason of Bailey & Voorhees," etc., is thereby sufficiently signed to bind each. Clason v. Bailey, 14 Johns. (N. Y.) 484. In Merritt v. Clason, 12 id. 102, 7 Am. Dec. 286, the memorandum was: "Bought of Daniel & Isaac Merritt . . . for Isaac Clason," etc. Said the court: "In the body of this memorandum the name of Isaac Clason, the defendant, is written by his agent, whom he had expressly authorized to make this contract. The memorandum, therefore, is equally binding on the defendant as if he had written it with his own hand; and if he had used his own hand, instead of the hand of his agent, the law is well settled that it is immaterial, in such a case, whether the name is written at the top, or in the body, or

§ 457. —— **Delegation.**— Like other mechanical acts, the signing by the agent may be through the medium of another, as his clerk, who signs in his presence and by his direction.[1] But, on the other hand, where the agency is a personal one, it cannot be delegated,[2] and hence if one person is authorized to make the memorandum, one signed by another person will not suffice.[3]

§ 458. —— **Not as witness.**— The signature of the agent which will suffice must, moreover, be that of the agent as agent;

at the bottom of the memorandum. It is equally a *signing* within the statute."

So a memorandum in a broker's book in this form is sufficient: "9th. W. W. Goddard to T. B. Coddington & Co.," followed by items and terms. This memorandum shows that Goddard is the seller and Coddington & Co. the buyers; and such writing of their names by their duly-authorized agent is sufficient without further signing. Coddington v. Goddard, 16 Gray (Mass.), 436. Said Bigelow, C. J.: "We know of no case in which it has been held that the signature of the name of the agent through whom the contract is negotiated should appear in the writing. It is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some person duly authorized to authenticate the document. Brokers and auctioneers are deemed to be the agents of both parties, and by virtue of their employment stand in such relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency. Such authority is implied from the necessity of the case; because without it they could not complete a contract of sale so as to make it legally binding on the parties. Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract, by which one agrees to sell and the other to buy the goods or merchandise specified upon the terms therein expressed. It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered, if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof. Penniman v. Hartshorn, 13 Mass. 87; Hawkins v. Chace, 19 Pick. (Mass.) 502, 505; Fessenden v. Mussey, 11 Cush. (Mass.) 127; Morton v. Dean, 13 Met. (Mass.) 385; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446."

See also New England Dressed Meat Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. R. 112.

[1] Williams v. Woods, 16 Md. 220.

[2] Mechem on Agency, § 185.

[3] Henderson v. Barnewall, 1 Y. & J. 387. In this case a broker's clerk was deputed to make the memoran-

if, therefore, he signs merely as a witness to the transaction, it is not enough.[1]

§ 459. One person as agent of both parties.— A person may act as the agent of two or more parties in the same transaction if his duties to each are not such as to require him to do incompatible things; but wherever, from the nature of his employment, each of two principals whose interests are antagonistic is entitled to the benefit of the agent's judgment, discretion or personal influence, the agent will not be permitted to act for both in the same transaction, except with their full knowledge and consent.[2] If, however, with full knowledge of his relations to each, they see fit to mutually confide in him, there is no legal objection to it, nor can either principal afterwards escape responsibility because of such double employment.[3]

§ 460. —— Evidence of authority to sign for both.— But while one person may thus act for both parties, such a double relation will not be lightly inferred, but the evidence must be such as to indicate an intention on the part of both that the act of the agent should be their act respectively.[4] Thus, where the plaintiff's traveling agent wrote out an order for goods in duplicate upon printed headings in the presence of the defendant, handing him the duplicate and retaining the original, it was held that there was no evidence in this that plaintiff's agent was authorized to sign the memorandum as defendant's agent also.[5]

dum, and it was held that a memorandum made by the broker would not suffice.

[1] Gosbell v. Archer, 2 Ad. & El. 500.

[2] Mechem on Agency, § 67, and cases cited.

[3] Mechem on Agency, § 67, and cases cited.

[4] See extract from Murphy v. Boese, L. R. 10 Exch. 126, in second note below.

[5] Murphy v. Boese, *supra*. So in Graham v. Musson, 5 Bing. N. C. 603, the buyer of goods requested the agent of the seller to write a note of the contract in the buyer's book, which the agent did, and signed it with his own name. *Held*, that this request did not constitute him the buyer's agent, so as to make his signature bind the buyer. It was said, however, by Collman, J., that if he had signed the buyer's name instead of his own the case might have been different.

But in another case plaintiff had goods in the possession of his agent and went with the defendant to the agent's premises and there conducted a bargain in the agent's presence. The agent thereupon made a memorandum in his book and also a counterpart, tore out the memorandum and gave it to defendant, who kept it and carried it away. Before going, defendant requested an alteration to be made in the memorandum, and the agent made it with the plaintiff's assent. The memorandum was in the following form: "Messrs. Evans (the defendants) bought of T. T. & W. Noakes (the agents), T. Durrell" (the plaintiff), followed by a description of the goods and the price. The counterpart entry was, "Sold to Messrs. Evans, T. Durrell," etc. It was held that there was evidence to go to the jury that the agent in making these entries was the agent of the defendant as well as the plaintiff, and if he was, then his writing the name "Messrs. Evans" was a sufficient signing to bind them.[1]

[1] Durrell v. Evans, 1 H. & C. 174, reversing s. c., 6 H. & N. 660. (Graham v. Musson, *supra*, was distinguished, and the case was likened to Johnson v. Dodgson, 2 M. & W. 653.) In the later case of Murphy v. Boese, *supra*, Pollock, B., said: "I think that it is extremely important in all those cases in which it is attempted to prove an implied agency, or that there is evidence from which an agency may be inferred, to take into account the character of the parties and their usual course of dealing. The act requires that the note of the bargain should be signed by an agent of the party to be charged. At first sight it would seem odd that where two contracting parties meet together, that one who is in a position somewhat adverse to the other should be his representative and agent. But no doubt such a thing may happen, as in the instance, which has very properly been cited, of the auctioneer's clerk signing as the agent of both parties. In Lord St. Leonard's work on Vendors and Purchasers (14th ed., p. 147) he explains the principle upon which the auctioneer can bind both vendor and purchaser by his signature, citing Earl of Glengal v. Barnard, 1 Keen, 769, and Emmerson v. Heelis, 2 Taunt. 38, and stating that the implied agency of an auctioneer is not extended to other cases. Therefore the present case is not within this exceptional rule. The case to which it has the nearest analogy is that of Durrell v. Evans, 1 H. & C. 174, 31 L. J. (Ex.) 337, and it is remarkable that when that case came before the court of exchequer, Lord Penzance seems to have drawn the conclusion that what was done was nothing more than what occurs in making out and giving an invoice. I am bound to say that I agree with his reasoning, and I will apply it to the present case. I think Durrell v.

§ 461. Signing by auctioneer.— An auctioneer employed by the owner of real or personal property, or of rights of any kind, to sell or dispose of the same at auction, is primarily the agent of the owner, and of him alone; and he remains his agent exclusively up to the moment when he accepts the bid of the purchaser and knocks down the property to him. Upon the acceptance of the bid, however, the auctioneer becomes the agent of the purchaser also, to the extent that it is necessary to enable the auctioneer to complete the purchase, and he may therefore bind the purchaser by entering his name as such and by signing the memorandum of the sale.[1] Such a signing is sufficient to satisfy the statute of frauds.[2] But in order to so bind the purchaser, the entry of the name of the purchaser must be done

Evans, *supra*, can only be supported if it decides that the agency did not commence till after the memorandum had been written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes, the factor, to alter the instrument was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties in drawing up a note of the contract. But here there is an entire absence of any act of recognition by the defendant of the traveler as his agent."

[1] Bent v. Cobb, 9 Gray (Mass.), 397, 69 Am. Dec. 295; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Thomas v. Kerr, 3 Bush (Ky.), 619, 96 Am. Dec. 262; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. R. 616.

[2] Bent v. Cobb, *supra;* Sanborn v. Chamberlin, 101 Mass. 409; Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Thomas v. Kerr, *supra;* Harvey v. Stevens, 43 Vt. 653; Hart v. Woods, 7 Blackf. (Ind.) 568; Adams v. McMillan, 7 Port. (Ala.) 73; O'Donnell v. Leeman, 43 Me. 158; Linn Boyd Tobacco Co. v. Terrill, 13 Bush (Ky.), 463; Brent v. Green, 6 Leigh (Va.), 16; Pike v. Balch, 38 Me. 302; Pugh v. Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414; McComb v. Wright, 4 Johns. (N. Y.) Ch. 659; First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Morton v. Dean, 13 Metc. (Mass.) 385; Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243; Farebrother v. Simmons, 5 B. & Ald. 333; Simon v. Motivos, 3 Burr. 1921; Hinde v. Whitehouse, 7 East, 558; White v. Proctor, 4 Taunt. 209; Emmerson v. Heelis, 2 Taunt. 38. But where the auctioneer is a party in interest, his memorandum is not sufficient. Bent v. Cobb, *supra;* Tull v. David, 45 Mo. 444, 100 Am. Dec. 385; Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243.

by the auctioneer or his clerk immediately upon the acceptance of his bid and the striking down of the property; it must be done at the time and place of the sale, and cannot be done after the sale is over.[1] The principle upon which this rule is founded, as is said by a learned judge, is "that the auctioneer *at the sale* is the agent; that the purchaser, by the act of bidding, calls on him or his clerk to put down his name as the purchaser. The entry, being made in his presence, is presumed to be made with his sanction, and to indicate his approval of the terms thus written down. In such case there is but little danger of mistake or fraud. But if a third person, not present, or even the auctioneers, may afterward add the name of another purchaser, they may strike out the name already inserted and substitute that of a new and different purchaser. They may defeat rights already vested. They may impose liabilities never contracted. The party to be charged may thus

[1] Mechem on Agency, § 893. "It appears now to be settled by the English authorities, . . . that the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction; and the insertion of his name as the highest bidder in the *memorandum* of the sale by the auctioneer, immediately on receiving his bid and striking down the hammer, is a signing within the statute so as to bind the purchaser." Chancellor Kent, in McComb v. Wright, 4 Johns. Ch. (N. Y.) 659, 663.

"It is now well settled by authorities, that a sale of real estate at auction, where the name of the bidder is entered by the auctioneer, or by his clerk under his direction, on the spot, and such entry is so connected with the subject and terms of sale as to make a part of the memorandum, is a contract in writing, so as to take the case out of the statute of frauds." Story, J., in Smith v. Arnold, 5 Mason (U. S. C. C.), 414, 419.

"The name of the bidder must be entered by the auctioneer, or by his clerk under his direction, on the spot." Shaw, J., in Gill v. Bicknell, 2 Cush. (Mass.) 355, 358.

"The law, therefore, when it allows him (the auctioneer) to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied in the usual cases of agency, and requires that the single act for which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of sale, and before the termination of the proceedings." Kent, J., in Horton v. McCarty, 53 Me. 394–398. To the same effect, see Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299, where the entry was held too late, though made in the afternoon of the same day; Hicks v. Whitmore, 12 Wend. (N. Y.) 548, where one hour's delay was held fatal.

be held liable by a writing he never saw, signed by an agent of whom he never heard."[1]

§ 462. But auctioneer who sells his own goods cannot sign for buyer.— Where, however, the auctioneer is himself the seller of the goods, this implied power to bind the buyer does not exist,[2] inasmuch as the same party cannot, as has been seen,[3] be at once both party and agent for the opposite party, without the latter's knowledge and consent. With such express consent, however, he may act for both.[4]

But the clerk of the auctioneer may act as agent for both parties, and his memorandum will bind both.[5]

[1] Staples, J., in Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. R. 616.

[2] In Johnson v. Buck, 35 N. J. L. 338, 10 Am. R. 243, it is said: "The agent, to make the signature, must be some third person. Neither of the contracting parties can be agent for the other. A signature by the vendor or purchaser, of the name of the other, is not a sufficient signing. Wright v. Dannah, 2 Camp. 203; Rayner v. Linthorne, 2 C. & P. 124; Sharman v. Brandt, L. R. 6 Q. B. 720; Bent v. Cobb, 9 Gray (Mass.), 397, 69 Am. Dec. 295. Where the suit is brought by the auctioneer himself, for the purposes of that suit he is regarded as a contracting party, and a signing by him of the name of the defendant is insufficient. Farebrother v. Simmons, 5 B. & Ald. 333." See also Smith v. Arnold, 5 Mason (U. S. C. C.), 414; Tull v. David, 45 Mo. 444, 100 Am. Dec. 385.

[3] See *ante*, § 452.

[4] Mechem on Agency, § 68.

[5] In Johnson v. Buck, *supra*, the court further say: "But the reason of this disqualification to be the agent of the purchaser, for the purpose of signing, does not apply to the clerk of the auctioneer. When the bids are announced, and the property struck off, the clerk is the agent of both parties to record the sales and affix the signature of the purchasers, although he is employed to act as clerk by the auctioneer. No reason for his disability to act as agent for the purpose of making the signature of the purchaser, as between the latter and the auctioneer, can be adduced, which will not operate equally to exclude the auctioneer, where the litigation is directly between the vendor and purchaser. The question, in every case, is one of fact, whether the person by whom the signature has been made was an agent lawfully authorized to make the same. Auctioneers and brokers, by virtue of their business, by the usages of trade, are assumed to have such authority; and where the auctioneer's clerk, or a volunteer, acts openly at a sale in entering the successful bids, as they are publicly announced, his authority to act for the purchaser in the premises is established. Consequently, it has been held that, in a suit in the name of the auctioneer against a purchaser to recover the

§ **463. Broker as agent of both parties.**— The purchase and sale of goods is constantly being effected through the medium of a special class of agents called brokers. The broker, like other agents, owes a duty of fidelity and single-mindedness to his employer which renders him incompetent to enter into the service of both parties to the same transaction, except with the full knowledge and consent of both.[1] With this knowledge and consent, however, he may act for both,[2] and in a great number of mercantile transactions he represents both parties by their express or implied authority; and where he does so, his signing of the name of each party binds each.[3]

§ **464. —— How authorized.**— This authority need not be expressly conferred, and in practice ordinarily is not. At the outset the broker is the agent of the party who first employed him, but he becomes the agent of the other also, when the latter instructs him to close the bargain,[4] or deals with him as representing both parties,[5] or subsequently ratifies what, as agent of both parties, he has assumed to do.[6] When so authorized he has, like other agents, implied authority to do whatever is necessary and proper to carry his authority into effect, including herein the signing of the necessary memorandum.[7]

price of the goods, the signing of the purchaser's name by the clerk of the auctioneer, upon the successful bid being announced, is a sufficient bid within the statute. Bird v. Boulter, 4 B. & Ad. 443; Browne on Frauds, sec. 369; Durrell v. Evans, 1 H. & C. 174-188; Gill v. Bicknell, 2 Cush. (Mass.) 355." See also Wood on Statute of Frauds. § 427.

[1] Mechem on Agency, §§ 943, 953.

[2] Mechem on Agency, §§ 943, 953.

[3] Wood on Statute of Frauds, § 429; Butler v. Thomson, 92 U. S. 412; Newberry v. Wall, 84 N. Y. 576; Bacon v. Eccles, 43 Wis. 227; Coddington v. Goddard, 16 Gray (Mass.), 436.

[4] Coddington v. Goddard, *supra*.

[5] Bacon v. Eccles, *supra*. So where a broker, originally employed by the buyer, having closed a bargain with the sellers, made a memorandum of it, at the time and in their presence, in which they were described as sellers, it was held that the sellers thereby recognized him as their agent also. Clason v. Bailey, 14 Johns. (N. Y.) 484.

[6] Their assent may be presumed where they receive and retain without dissent a memorandum of the sale made by the broker as their agent as well as of the other party. Newberry v. Wall, 35 N. Y. Super. Ct. 106; s. c., 65 N. Y. 484; s. c., 84 N. Y. 576; Remick v. Sandford, 118 Mass. 102.

[7] Coddington v. Goddard, *supra*.

§ 465. —— When special agent.— Where, however, he is thus authorized to represent the other party in a single transaction inaugurated by the broker as agent of the first, he is deemed to be a special agent, and he will not bind such other party unless he keeps within the limits of the authority conferred upon him.[1]

§ 466. —— When not authorized to sign.— And where he is not employed to make the contract, but simply acts as a go-between to bring together the parties, who make the contract themselves, he has no implied authority therefrom to afterwards make any memorandum of the contract at all.[2]

§ 467. "Bought and sold notes" in the English practice. In England, the usages of London have entered very greatly into the law upon this subject, and the rights and obligations of the parties are therefore much governed by the established usages controlling the London broker. When such a broker has succeeded in making a contract, says Mr. Benjamin in his

[1] Thus in Coddington v. Goddard, *supra*, where the broker, acting primarily for the buyer, did not include in the memorandum terms and conditions upon which the seller authorized him to close the sale, it was held that the seller was not bound. Said the court: "A broker, from the very nature of his employment, has only a limited authority, when it appears, as it does in the present case, that he had no relation to a party, other than what is derived from a single contract of sale. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further, and he cannot be regarded as his agent, unless he complies with the terms of his special authority as derived from the contract. In short, a broker is authorized to sign only that contract into which the vendor has entered, not another and different contract. If he omits to include in the memorandum special exceptions and conditions to the bargain, he signs a contract which he has no authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to sign the contract." To same effect: Remick v. Sandford, 118 Mass. 102.

[2] Aguirre v. Allen, 10 Barb. (N. Y.) 74.

work on Sales,[1] "he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book and sign the entry. What he delivers to the seller is called the sold note; to the buyer, the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice. The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note, then, in substance, says, 'Sold for A B to C D,' and sets out the terms of the bargain; the bought note begins, 'Bought for C D of A B,' or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker. The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, 'Bought for C D' and 'Sold for A B.' The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, 'Bought for you by me,' he gives it in this form: 'Sold to you by me.' By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible. The *fourth* form is where the broker professes to sign as a broker but is really a principal, as in the cases of *Sharman v. Brandt*[2] and *Robinson v. Mollett*,[3] in which case his signature does not bind the other party, and he cannot sue on the contract.

"According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, 'I have bought for you, or I have sold for you,' plainly admits that the broker acted by his authority and as his agent, and the signature of the broker is therefore the signature of

[1] § 276. [2] L. R. 6 Q. B. 720. [3] L. R. 7 H. L. 802, 14 Eng. R. 177.

the party accepting and retaining such a note; but according to the third form, the broker says, in effect, 'I myself sell to you,' and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and, in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note; and by the fourth form, the language of the written contract is at variance with the real truth of the matter."

§ 468. —— **English rules governing the bought and sold notes.**— As to the rules governing the bought and sold notes, Mr. Benjamin gives the following summary:[1]

"First — The broker's signed entry in his book constitutes the contract between the parties, and is binding on both.[2]

"Secondly — The bought and sold notes do not *constitute* the contract.[3]

"Thirdly — But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry.[4]

[1] Benjamin on Sales, § 294.

[2] "This proposition rests on the authority of Lord Ellenborough in Heyman v. Neale, 2 Camp. 337, of Parke, B., in Thornton v. Charles, 9 M. & W. 802, and of Lord Campbell, C. J., and Wightman and Patteson, JJ., in Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529 (and of the court in Thompson v. Gardiner, 1 C. P. D. 777). Gibbs, C. J., in Cumming v. Roebuck, Holt, 172; Abbott, C. J., in Thornton v. Meux, M. & M. 43; Denman, C. J., in Townend v. Drakeford, 1 Car. & K. 20, and Lord Abinger in Thornton v. Charles, 9 M. & W. 802, are authorities to the contrary, but they seem to have been overruled in Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529."

[3] "This is the opinion of Parke, B., in Thornton v. Charles, 9 M. & W. 802, of Lord Ellenborough in Heyman v. Neale, 2 Camp. 337, and was the unanimous opinion of the four judges in Sievewright v. Archibald, 17 Q. B. 103. The decision to the contrary, in the *nisi prius* case of Thornton v. Meux, M. & M. 43, and the *dictum* Goom v. Aflalo, 6 B. & C. 117, and Trueman v. Loder, 11 Ad. & E. 589, are pointedly disapproved in the case of Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529."

[4] "This was first settled by Goom v. Aflalo, 6 B. & C. 117, and reluct-

"Fourthly — Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book.[1]

"Fifthly —Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance.[2]

"Sixthly — As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions that this entry will in general control the case, because it constitutes the contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitute evidence of a *new* contract modifying that which was entered in the book.[3]

"Seventhly — If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and

antly admitted to be no longer questionable in Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529."

[1] "This was the decision in Hawes v. Forster, 1 Mood. & Rob. 368, of the common pleas in Parton v. Crofts, 16 C. B. (N. S.) 11, 33 L. J. C. P. 189 (and of the common pleas division in Thompson v. Gardiner, 1 C. P. D. 777)."

[2] "Hawes v. Forster, 1 Mood. & Rob. 368, is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in Parton v. Crofts, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's."

[3] "This is the point established by Hawes v. Forster, 1 Mood. & R. 368, according to the explanation of that case first given by Parke, B., in Thornton v. Charles, 9 M. & W. 802, afterwards by Patteson, J., in Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529, and adopted by the other judges in this last-named case." But the variance must be one in *meaning* and not in *language* merely.

the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes.[1]

"Eighthly — If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract.[2]

"Lastly — If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves."[3]

§ 469. —— "Bought and sold notes" in the United States. The usages of the London brokers have not been generally adopted in the United States, though "bought and sold notes" are not rare; but, in general, here the broker's book constitutes the appropriate place for his entry,[4] and such entries, as has been seen in the preceding sections, are looked upon with favor; and, however informal or inartificial they may be, if they contain the essential elements of the contract and are duly signed

[1] "As decided in Heyworth v. Knight, 17 C. B. (N. S.) 298, 33 L. J. C. P. 298."

[2] "This is settled by Thornton v. Kempster, 5 Taunt. 786; Cumming v. Roebuck, Holt, 172; Thornton v. Meux, 1 M. & M. 43; Grant v. Fletcher, 5 B. & C. 436; Gregson v. Rucks, 4 Q. B. 737, and Sievewright v. Archibald, 17 Q. B. 103, 20 L. J. Q. B. 529. The only opinion to the contrary is that of Erle, J., in the last-named case. In one case, however, at *nisi prius* (Rowe v. Osborne, 1 Stark. 140), Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor, which did not correspond with the note signed by the broker and sent to the defendant."

[3] "This was decided in Hodgson v. Davies, 2 Camp. 530, and as the special jury spontaneously intervened in that case, and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof. See Brandao v. Barnett, 3 C. B. 519, on appeal to H. of L. (S. C., 12 Cl. & Fin. 787), as to the necessity for proving mercantile usages. Also, 1 Smith's L. C. 602 (ed. 1879); but it would certainly be more prudent to offer evidence of the usage."

[4] Bacon v. Eccles, 43 Wis. 227.

in such manner as signing has been found to be required, they will suffice.

If, however, the parties adopt the English system, the rules laid down by the English courts would of course be applicable.[1]

§ 470. —— **Revocation of broker's authority.**— The authority of the broker, like that of any other agent not coupled with an interest,[2] may be revoked at any time before he has acted, as in making the memorandum;[3] but after he has signed, if duly authorized, the principal cannot withdraw, except in the case, warranted by usage in England, of a sale by the agent on credit to a person not previously disclosed, in which event the principal may withdraw within a reasonable time after receiving the sale note, if, on inquiry, he is dissatisfied with the responsibility of the purchaser.[4]

§ 471. **Signing by partner.**— Not only may the signature of the agent to the memorandum evidencing his contract for his principal bind the principal, but also the signature of one partner to a memorandum evidencing an agreement made by him on behalf of the partnership and within the scope of its business will bind the other partners; and this is upon the basic rule of all partnerships that the act of one partner, within the scope of the partnership business, is the act of the copartnership.[5]

e. Of Alteration of the Memorandum.

§ 472. **Alteration of executed memorandum.**— In general a material alteration of an instrument by one party destroys its effect in conferring any rights whatever upon him;[6] and the other party, at his option, may repudiate it altogether or

[1] Thus if "bought and sold notes" are given, a material variance between them will vitiate them. Bacon v. Eccles, 43 Wis. 227; Suydam v. Clark, 2 Sandf. (N. Y.) 133; Peltier v. Collins, 3 Wend. (N. Y.) 459.

[2] Mechem on Agency, § 938.

[3] Farmer v. Robinson, 2 Camp. 339, n.; Warwick v. Slade, 3 Camp. 127.

[4] Hodgson v. Davies, 2 Camp. 530.

[5] California Canneries Co. v. Scatena, 117 Cal. 447, 49 Pac. R. 462.

[6] See Bishop on Contracts, § 746 et seq.

rely on it in its original state.[1] Hence, if the seller makes, or causes to be made, a material alteration in the memorandum after it has taken effect, he cannot ignore the alteration and enforce it as it stood.[2]

§ 473. Memorandum not to be altered by parol.— And so, as has been seen,[3] the completed memorandum is not to be altered or modified by parol. Hence, "where a contract, affected by the statute, has been put in writing, and the plaintiff, in a case of subsequent oral variation of some of the terms of the written agreement, declares upon the writing as qualified by the oral variation, he cannot prevail."[4]

§ 474. Discharge or substitution of agreement may be shown.— But this rule seems not to prevent a showing by parol that the written agreement which was required by the statute of frauds has been wholly discharged, or that some new and different agreement has been substituted for it.[5]

[1] Bishop on Contracts, § 748.

[2] Powell v. Divett (1812), 15 East, 29; Mollett v. Wackerbarth (1847), 5 Com. B. 181, 17 L. J. Com. P. 47, 57 Eng. Com. Law, 180.

[3] See *ante*, § 446 *et seq.*

[4] Browne on Statute of Frauds, § 411; Augusta Southern R. Co. v. Smith (1899), 106 Ga. 864, 33 S. E. R. 28; Burns v. Fidelity Real Estate Co., 52 Minn. 31, 53 N. W. R. 1017; Heisley v. Swanstrom, 40 Minn. 196, 41 N. W. R. 1029; Hill v. Blake, 97 N. Y. 216; Carpenter v. Galloway, 73 Ind. 418; Rucker v. Harrington, 52 Mo. App. 481.

[5] See Browne, Statute of Frauds, §§ 429–436; Greenleaf on Evidence, § 302; Cummings v. Arnold (1842), 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall (1851), 9 Cush. (Mass.) 31.

BOOK II.

OF THE EFFECT OF THE CONTRACT IN PASSING TITLE.

CHAPTER I.

PURPOSE OF BOOK II.

§ 475. Subjects yet to be considered.
476. Executory and executed contracts.
477–479. —— Intention of parties as the test.
480. Specific or unascertained goods.
481. How questions classified.

§ 475. Subjects yet to be considered.— Having considered the questions of the making of the contract, the parties to it, and its form and sufficiency, it next remains to consider the effect of the contract in passing title to the property which was the subject-matter of the contract. This question depends largely upon the distinction between executory and executed contracts.

§ 476. Executory and executed contracts.— As has been already seen, a distinction is to be taken between a present sale, *i. e.*, a present transfer of the title, and an agreement to sell, by virtue of which the title is to be transferred at some future time. The first is the executed contract or sale proper; the latter is the executory contract or the contract for a sale.

Now it is entirely competent for the parties to make either form of contract, and where they have clearly and unambiguously made one form or the other there can be no difficulty. The difficulty arises in those cases in which they either had no definite intention at all, or, if they had, they have failed to make it clear.

The consequences, however, are material; for if the title has not yet passed, the intending seller is charged with the responsibility for the goods, is liable for their loss, has no present claim for the price, but, at the same time, he has incurred as yet no risk of not getting his pay. If the contract be executed, on the other hand, all this is changed; for the risk of the goods has passed to the purchaser, who is liable for the price, while the seller has either the price in hand or the right to it, and may have a lien upon the goods to secure its payment.

§ 477. —— **Intention of the parties is the criterion.**— The question of possession is sometimes significant, but it is not the criterion; for, as will be seen, the title may pass though the seller retains possession, or the title may be retained though possession has been given to the prospective purchaser. The true criterion is the intention of the parties, to be discovered, when possible, from their express declarations; and where this is not possible, to be gathered from all the circumstances of the case, as well as from their declarations, if any.

§ 478. ——. There are, however, many incidents which, as will be seen, are ordinarily regarded as raising a presumption that the title has or has not passed, though this presumption yields to the intention. For example, it is said,[1] "Though by the general rule of law the sale is not complete if anything remains to be done between the parties, yet they may agree, either expressly or tacitly, to change this, and that the title to the property shall pass at once. *Conditio quæ initio contractus dicta est, postea alia pactione immutari potest.*[2] Thus, though it is implied that a sale is for ready money unless otherwise agreed, yet the condition to pay immediately may be waived, and the goods at once passed to the buyer.[3] Writings may be agreed to be made, but this stipulation may be changed or

[1] In Fuller v. Bean (1857), 34 N. H. 290.

[2] Citing Dig. 18, 1, 6; Alexander v. Gardner, 1 Bing. N. C. 671; 2 Kent, Com. 496; Blackb. on Sale, 160.

[3] Citing 2 Kent, Com. 496; Schindler v. Houston, 1 Denio (N. Y.), 48; Mixer v. Cook, 31 Me. 340; Blackb. Sale, 147.

waived.[1] Measures to ascertain quantity or price may be agreed upon, but tacitly waived or expressly postponed, or dispensed with."[2]

§ 479. ——. So it was said by Lord Brougham:[3] "To constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, should be ascertained in the first instance, and that there should be a price either ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale, or upon a *quantum valeat;* or they may agree that the sale shall be complete and the property pass in the specific thing, chattel or other goods, although the delivery of possession is postponed, and although nothing shall remain to be done by the seller before the delivery; or they may agree that nothing remains to be done for ascertaining the thing sold, yet that the sale shall not be complete and the property shall not pass till something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in this respect, and that is of course to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property, until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done."

§ 480. **Specific or unascertained goods.**—In addition to the question of the executed or executory nature of the contract, the character and situation of the goods are material. Are the goods specific and definitely agreed upon, or are they not yet ascertained, or perhaps not yet in existence? Are they now in the condition in which they are to be delivered, or are they

[1] Citing Draper v. Jones, 11 Barb. (N. Y.) 263.

[2] Citing Macomber v. Parker, 13 Pick. (Mass.) 175.

[3] In Logan v. Le Mesurier, 6 Moore, P. C. 116.

yet to be fitted for delivery? Are they separated from the mass of which they previously formed a part, or are they still in the mass and yet to be separated and set apart for the buyer? These and similar questions are obviously material; and the two classes of questions present a variety of combinations.

§ 481. How questions classified.— Attempting to group these various elements in logical order there will be considered here:

I. Unconditional contracts for the sale of specific chattels.
II. Conditional contracts for the sale of specific chattels.
III. Contracts respecting existing chattels not yet identified.
IV. Contracts respecting goods to be manufactured or grown.
V. Contracts reserving *jus disponendi.*

Each of these will be made the subject of a separate chapter, and together these questions will form the subject-matter of Book II.

CHAPTER II.

OF THE UNCONDITIONAL SALE OF SPECIFIC CHATTELS.

§ 482. Purpose of this chapter.
483, 484. Title passes at once on unconditional sale of specific chattel.
485, 486. Title may pass though goods not delivered.
487, 488. —— Or though seller is yet to make delivery.
489. —— Or though seller is to do some other act before delivery.
490. —— Or though seller is to do something to the goods after delivery.
491. —— Or though goods are in hands of seller's bailee or agent.
§ 492. —— Or though goods remain with seller as bailee for buyer.
493–495. Title may pass though price not yet paid.
496–498. —— Or though something remains to be done to ascertain the price.
499. The question is one of intention.
500, 501. Rules for determining the intention.
502. Question of intention, by whom decided.

§ 482. Purpose of this chapter.— It is proposed in this chapter to take up what is perhaps the simplest and most common of the several combinations of questions referred to in the preceding chapter, namely, the case of the unconditional contract to sell a specific chattel. And the particular question will be this: Where the parties have in mind a definite, ascertained and existing chattel, and they respectively agree without condition or qualification that one shall then sell and the other shall then buy that particular chattel, what is the effect of their agreement upon the transfer of the title to the chattel?

To this question it is believed that the law returns the answer which forms the substance of the following section, viz.:

§ 483. Title passes at once on unconditional sale of specific chattel.— When the terms of the contract of sale have been definitely agreed upon and the goods have been specific-

ally ascertained, and nothing remains to be done by the seller except to deliver the goods, the effect of the contract, as between the parties thereto,[1] will, unless a contrary intention appears, be to vest the title to the property immediately in the purchaser, even though the goods have not yet been delivered or paid for. The purchaser cannot, indeed, take the goods away until he has paid for them, unless a term of credit has been given, but the title and therefore the risk of the goods will be in him, and the seller may have his remedies for the price.[2]

[1] The question may be affected, of course, by the rules which regulate the effect, so far as creditors and subsequent purchasers are concerned, of the retention of possession by the seller. See *post.* §§ 962, 979. But those rules are foreign to the present consideration.

[2] In Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79, Breese, J., says: "It is a general rule of the common law as to sale of chattels, that, as between the vendor and vendee, no actual delivery, symbolical or otherwise, is necessary, the completion of the bargain being all that is requisite to pass the title, though not the possession, until the price be paid or satisfactorily arranged. In Noy's Maxims, as quoted by Lord Ellenborough, C. J., in Hinde v. Whitehouse and Galan, 7 East, 558, it is said: 'If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer.' So in 2 Bl. Com. 448, citing Noy. Kent says: 'When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete. the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer.' 2 Kent's Com. 492. In Potter v. Cowand, Meigs, 22, it is said: 'It is not the delivery or tender of the property, nor the payment or tender of the purchase-money, which constitutes a sale. The sale is good and complete as soon as both parties have agreed to the terms — then the rights of both are instantly fixed. But to have an action for the price, the seller must deliver or offer to deliver the property. If he tenders a delivery of the property and demands the purchase-money, he may have his action of debt or *assumpsit* if it be refused.' In Willis v. Willis' Adm'r, 6 Dana, 48, the doctrine was declared that a sale of goods becomes absolute, the property vested in the buyer and at his risk, as soon as the bargain is concluded, without actual payment or delivery. In Tarling v. Baxter, 6 Barn. & Cress. 360, 9 Dow. &

§ 484. ——. The rules here applicable were very clearly stated in an English case by Parke, J., as follows: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without deliv-

Ry. 272, the court say: 'The rule of law is that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that if it be destroyed the loss falls on the vendee.' So in Gardner v. Howland, 2 Pick. 599: Shumway v. Rutter, 8 id. 443, 19 Am. Dec. 340: Parsons v. Dickinson, 11 id. 352. The same doctrine is recognized in North Carolina. State v. Fuller, 5 Ired. L. 26. So in Ohio, the court say, in Hooban v. Bidwell, 16 Ohio, 509, 47 Am. Dec. 386: 'The civil law required a delivery, and so, it has been said, did the common law. But we think delivery not necessary by the common law to pass the title to personal property; that a sale without it is complete as between the parties, though it be not so as to affect the interests in certain cases of third persons.' In New Hampshire (Ricker v. Cross, 5 N. H. 571, 22 Am. Dec. 480), the court say: 'The general rule is that the delivery of possession is necessary in a conveyance of personal chattels as against every one except the vendor. Between the vendor and the vendee the property will pass without delivery, but not with respect to third persons who may afterwards, without notice, acquire a title to the goods under the vendor. An actual delivery by the vendor to the vendee is not in all cases necessary.' So in Maine (Wing v. Clark, 24 Me. 366), it is held that 'when the terms of sale of personal property are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property in the goods is in the buyer; and if they are destroyed by accidental fire he must bear the loss.' So in Bradeen v. Brooks, 22 Me. 463. A party becomes a buyer when goods are knocked down to him at an auction. Hilliard on Sales, 323. In the case of Lansing v. Turner, 2 Johns. 13, the court held to the rule as laid down by Blackstone; and Thompson, J., says: 'This I apprehend to be the rule in all cases on the sale of a specific chattel where the identity of the article cannot be controverted, the inference of the law being that the vendor is a mere bailee, retaining the possession at the request of the vendee.'"

"Wherever there is a sale of personal property, where nothing remains to be done by the seller before it is delivered, the property passes to the buyer without delivery; and if injured or destroyed after the sale, the loss falls upon the purchaser, and the seller is entitled to payment of the price." England v. Forbes, 7 Houst. (Del.) 301, 31 Atl. R. 895. See also the exhaustive discussion in Com. v. Hess (1892), 148 Pa. St. 98, 23 Atl. R. 977, 33 Am. St. R. 810.

In Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274, Coke, J., said: "By the common law, if the seller make a proposition and the buyer

ery. . . . Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of the goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."[1]

§ 485. Title may pass though goods not yet delivered. Following the general rule as laid down in the preceding section more fully into details, it is to be observed that the title to the goods may often, as between the parties,[2] pass though the goods have not yet been delivered. Assuming that the statute of frauds is not involved or has been satisfied, and that the rights of subsequent purchasers or creditors are not concerned, it is abundantly settled that if the goods are fully identified, appropriated to the contract, and are in condition for delivery, and if the terms of the contract are agreed upon, the title will, unless a contrary intention appears, pass at once upon the completion of the contract, even though the goods are not delivered,[3]

accept, and the goods are in the possession of the seller, and nothing remains to be done to identify them, or in any way prepare them for delivery, the sale is complete, and the property in the goods passes at once. The buyer acquires not a mere *jus ad rem*, but an absolute *jus in re*, and he may demand delivery at once on tender of the price, and sue for the goods as his own if delivery be refused. 2 Kent's Com. 492; 2 Parsons on Contracts (4th ed.), 320; 1 id. 441; Story on Sales, sec. 300."

[1] Dixon v. Yates, 5 B. & Ad. 313, 340. See also Joyce v. Swann, 17 C. B. (N. S.) 84; Turley v. Bates, 2 H. & C. 200; Chambers v. Miller, 13 C. B. (N. S.) 125; Hinde v. Whitehouse, 7 East, 558; Tarling v. Baxter, 6 B. & C. 360; Martindale v. Smith, 1 Q. B. 389; Wood v. Bell, 6 E. & B. 355.

[2] It must be kept in mind that the question of the validity of sales as against creditors and subsequent purchasers is not now being dealt with. There, as will be seen, different considerations are involved and an actual change of possession often requisite. See *post*, §§ 962, 979.

[3] "Standard authorities," said the United States supreme court in

or, as will be seen in a later section, notwithstanding that the price has not yet been paid.[1] As stated in a recent Minnesota case,[2] "Contracts for the purchase and sale of chattels, if complete and unconditional, and not within the statute of frauds,

Hatch v. Oil Co., 100 U. S. 124, "show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention." That delivery in such cases is not essential to the transfer of the title: Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471; Penley v. Bessey, 87 Me. 530, 33 Atl. R. 21; Cummings v. Gilman, 90 Me. 524, 38 Atl. R. 538; Com. v. Hess, 148 Pa. St. 98, 23 Atl. R. 977, 33 Am. St. R. 810; Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. R. 112; England v. Forbes, 7 Houst. (Del.) 301, 31 Atl. R. 895; Fletcher v. Nelson, 6 N. Dak. 94, 69 N. W. R. 53; Benedict, etc. Mfg. Co. v. Jones, 64 Mo. App. 218; Kneeland v. Renner, 2 Kan. App. 451, 43 Pac. R. 95; Sutherland v. Brace, 34 U. S. App. 638, 73 Fed. R. 624, 19 C. C. A. 589; Montgomery Furn. Co. v. Hardaway, 104 Ala. 100, 16 S. R. 29; Briggs v. United States, 143 U. S. 346; Albemarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. R. 871; Scarbrough v. Alcorn, 74 Tex. 358, 12 S. W. R. 72.

In Leonard v. Davis, 1 Black (U. S.), 476, where there was a written contract reciting that one party had "bought of" the other certain logs, described by their location, at so much per thousand feet for a certain quality, less per thousand for an inferior quality, all not merchantable to be rejected, the scaling and sorting to be done by a person designated, it was held that the property in the logs passed to the vendee by the force of the contract; since nothing remained to be done by the seller, the title passed to the buyer at the time the contract was executed.

Likewise in First Nat. Bank of Ottumwa v. Reno, 73 Iowa, 145, 34 N. W. R. 796, where the words of the written contract were, "I hereby sell," it was held that this phrase clearly indicated the intention of the parties to make a present sale and transfer of the property, notwithstanding that it was not delivered, and that the price remained unascertained, dependent upon the condition of the property in the future. So also in Ruthrauff v. Hagenbuch, 58 Pa. St. 103, there was a written contract which recited that the vendor hereby agrees to sell and doth sell "the said tobacco which is herein and hereby now delivered;" it was held a complete sale, and that the loss of the tobacco occasioned by a flood fell upon the vendee. In Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471, where the wording of the contract was essentially the same, the court placed no peculiar emphasis upon this fact, but held from other circumstances that, as nothing remained to be done by the parties in completion of the sale, the title passed. In all these cases

[1] *Post*, §§ 493–495.

[2] Rail v. Little Falls Lumber Co., *supra*.

are sufficient as between the parties to vest the property in the purchaser without delivery. The rule is that when the chattels are clearly designated and appropriated to the contract, are ready for immediate delivery, and the terms of sale, including the price, are explicitly given, there is an executed contract, and the title to the property, as between the parties, passes to the purchaser, even without actual payment or delivery."

§ 486. ——. This general rule, however, yields to evidence of a contrary intention, and the existence of such a contrary

save the last, the wording of the agreement has been held significant of the true intention of the parties and of the character of the transaction. This intention in all the cases was the cardinal point toward which inquiry was directed, and when ascertained was held to prevail.

When the property is incapable of delivery into the hand of the purchaser it will come under his control and title will pass to him by delivery of a bill of sale (Fletcher v. Nelson, 6 N. D. 94, 69 N. W. R. 53; Cook v. Van Horne, 76 Wis. 520, 44 N. W. R. 767), although the seller be put in possession as bailee (White v. McCracken, 60 Ark. 613, 31 S. W. R. 882); and although there be nothing done symbolical of an intention to vest the title in the purchaser, and owing to the ponderous nature of the articles, as of brick in a kiln, or copper in large quantity, it is impossible to make a manual delivery, the title will pass, if such is clearly shown to be the intention of the parties. Taylor v. Thurber, 68 Ill. App. 114; Hayden v. Demets, 53 N. Y. 426. In this latter case it was said that the title passed without delivery, and if the purchaser refused to accept the goods and pay the price, "the vendor may, after proper notice, sell the goods and recover the difference in price from the vendee, or sue for the difference between the contract and the actual price, in which case he elects to retain the property as his own, or he may recover the contract price, in which case he holds the property in trust for the vendee."

In Briggs v. United States, 143 U. S. 346, there was a sale to plaintiff, by one Morehead, of "all the cotton in my two plantations in Mississippi, near Eggs' Point and Greenville. Said cotton so sold embraces all that I may have baled and unbaled, gathered and ungathered, . . . supposed to be two thousand bales." This cotton was seized and sold by the United States during the war of the Rebellion. After the war was over the action was brought against the United States in the court of claims to recover the value of the cotton so seized. Mr. Justice Field held the title to the cotton was in the plaintiff, at the time of the seizure, by virtue of the bill of sale, and that notwithstanding the fact that it covered cotton yet to be raised, the title to this passed so soon as it appeared above the ground.

intention, when in dispute, is usually a question of fact for the jury, as will be seen in a later section.[1]

§ 487. —— **Or though the seller is yet to make delivery.** The title may also pass at once, if that appears to be the intention, even though the seller is yet to make a delivery. Thus, it is said by the United States court of appeals: "Undoubtedly, the general rule is, that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery;" but, quoting from Mr. Benjamin, the court continues: "Slight evidence is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances."[2]

§ 488. ——. The fact that the price is paid before the delivery is strong evidence that the title has already passed. Thus, in a case[3] often cited, it was said by Selden, J.: "If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner."

The payment of the price is not, however, indispensable; for

[1] *Post*, § 502.

[2] In McElwee v. Metropolitan Lumber Co., 37 U. S. App. 266, 69 Fed. R. 302, 16 C. C. A. 232.

[3] Terry v. Wheeler, 25 N. Y. 520. To like effect: Bethel Steam Mill Co. v. Brown, 57 Me. 9; Penley v. Bessey, 87 Me. 530, 33 Atl. R. 21; Lynch v. Daggett, 62 Ark. 592, 37 S. W. R. 227; Hagins v. Combs, 102 Ky. 165, 43 S. W. R. 222; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471; Morris v. Winn, 98 Ga. 482, 25 S. E. R. 562; Clinton Nat. Bank v. Studemann, 74 Iowa. 104, 37 N. W. R. 112; Burcham v. Griffeth, 31 Neb. 778, 48 N. W. R. 824.

if such appears to be the intention, the title will pass without either payment or present delivery.[1]

§ 489. —— **Or though seller is to do some other act before delivery.**— So, to state affirmatively what is hereafter stated negatively,[2] the title to a specific chattel may pass at once, if that appears to have been the intention of the parties, even though the seller has yet to do something to the goods to put them into the form or condition in which they are to be delivered.

"And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding."[3]

§ 490. —— **Or though seller is to do something to the goods after delivery.**— So, clearly, the title to a specific chattel may pass at once, even though the seller is bound to do something in reference to the goods after their delivery,[4] as to repair or regulate a watch sold, or put in operation an engine sold,[5] and the like. The question is one of intention as in other cases; but the title may pass at once, leaving to the purchaser, perhaps, the right to rescind the contract if the act agreed upon is not performed, or to retain the title and possession and maintain an action for the breach of the agreement.[6]

§ 491. —— **Or though goods are in hands of seller's bailee or agent.**— The fact that the goods, at the time of the sale, are in the possession of a bailee or agent of the seller, will not

[1] Thayer v. Davis, 75 Wis. 205, 43 N. W. R. 902.

[2] See *post*, §§ 507–514, where the subject is more fully considered.

[3] Per Cooley, J., in Lingham v. Eggleston, 27 Mich. 324, citing Whitcomb v. Whitney, 24 Mich. 486; Terry v. Wheeler, 25 N. Y. 520.

[4] See Hammond v. Anderson, 1 Bos. & Pul. N. R. 69.

[5] Mt. Hope Iron Co. v. Buffinton, 103 Mass. 62.

[6] Mt. Hope Iron Co. v. Buffinton, *supra*.

deprive the transaction of its character as a completed sale, if that result seems to have been intended by the parties. As was said by the court[1] in Missouri, "In the sale of personal property, in order to pass the title to the vendee, it is not necessary that the vendor should be in the possession. The sale may be entirely good although the goods are in the possession of a third party.[2] When the goods are in the possession of a bailee or agent of the seller, a completed or absolute sale confers an immediate and valid title to the purchaser without any formal delivery of the possession; the possession of the bailee or agent then becomes that of the purchaser, and operates not merely as a transfer of a right in action, but of the goods themselves."[3] The utmost that can be requisite, as between the parties, is that the vendor shall deliver to the vendee such evidence, authority or token as may be necessary to show the latter's right to receive possession.[4]

§ 492. —— Or though goods remain in hands of seller as bailee for buyer.— Where the goods have been ascertained and the terms of the sale are agreed upon, the title will pass as between the parties,[5] unless a contrary intention appears,

[1] In Erwin v. Arthur, 61 Mo. 386.

[2] Citing Benj. on Sales (3d Am. ed.), § 6, note *a*.

[3] To same effect, Williams v. Gray, 39 Mo. 201; Harding v. Manard, 55 Mo. App. 364; Allgear v. Walsh, 24 Mo. App. 134.

[4] Where the goods are in the possession of a bailee of the vendor, a bill of sale by the vendor gives an immediate and valid title to the purchaser without a formal delivery of the possession. Williams v. Gray, *supra* [citing Heine v. Anderson, 2 Duer. 318; Wood v. Tassell, 6 Ad. & El. (N. S.) 234; Sigerson v. Harker, 15 Mo. 101].

"When the vendor delivers to the purchaser, or to the purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, there is a constructive delivery of the property; and the delivery of the order vests the purchaser with the *indicia* of ownership, and has the same effect in transferring the title to the property as the delivery of the property." Union Stock Yard Co. v. Mallory, 157 Ill. 554, 41 N. E. R. 888, 43 id. 979, 48 Am. St. R. 341 [citing McCormick v. Hadden, 37 Ill. 370; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Webster v. Granger, 78 Ill. 230; Tuxworth v. Moore, 9 Pick. 347, 20 Am. Dec. 479; Carter v. Willard, 19 Pick. 1]. See also Hatch v. Bayley, 12 Cush. (Mass.) 27; Gibson v. Stevens, 49 U. S. (8 How.) 384.

[5] As to the effect upon the rights of

even though the goods are to remain, for some purpose, in the hands of the seller as bailee of the buyer. Thus, for example, where there was a sale of all the lambs which the seller had in his flock at a given price per head, and it was further agreed that the seller should keep the lambs at pasture until the buyer should call for them, it was held that the title passed at once and the risk of the lambs was imposed upon the buyer, even though they had not been separated from the other sheep and had not been paid for. Said the court: "The case is entirely unlike the sale of certain articles out of a large number. Here the sale was of all the spring lambs owned by the appellee. There was no setting apart to be done. There was no act of separation to be performed. There was no necessity for any counting, or weighing, or for any similar acts. The fact that the appellee was to retain possession of and pasture the lambs did not change the character of the transaction. It was none the less a sale because the seller agreed to care for the property. It was just as competent for the parties to agree that the seller should hold possession as bailee as for them to agree that anybody else might do so."[1]

Many similar cases are cited in the notes.[2]

creditors and subsequent purchasers of leaving the goods in the possession of the seller, see *post*, §§ 962, 979.

[1] Elliott, C. J., in Bertelson v. Bower, 81 Ind. 512 [citing Henline v. Hall, 4 Ind. 189; Cloud v. Moorman, 18 Ind. 40; Scott v. King, 12 Ind. 203; Marble v. Moore, 102 Mass. 443]. To same effect, Robertson v. Hunt, 77 Tex. 321, 14 S. W. R. 68; White v. McCracken, 60 Ark. 613, 31 S. W. R. 882; Barrow v. Window, 71 Ill. 214. See also Cady v. Zimmerman, 20 Mont. 225, 50 Pac. R. 553.

[2] Thus, where there was a sale of a particular colt, and a stipulation that it should remain with its mother until weaned (Sweeney v. Owsley, 14 B. Mon. (Ky.) 332; Henline v. Hall, 4 Ind. 189); and when there was a sale of lambs to remain with the seller until required by the vendee (Bertelson v. Bower, 81 Ind. 512), it was held the title to the property passed to the vendee, notwithstanding its remaining in the possession of the vendor. Barrow v. Window, 71 Ill. 214. So also in an early Kentucky case (Willis v. Willis' Adm'r, 6 Dana, 48), where there was an exchange of slaves, but owing to their youth the possession was not changed, it was held that nevertheless the property passed, and they were at the risk of their respective bargainees. Likewise, where hay was sold by letter, the amount by weight being unknown, but all that was in

§ 493. Title may pass though price not yet paid.— It is not at all essential to the transfer of the title that the price shall have been paid. The title, as has been seen, passes as

a particular place was conveyed, it was held a good sale without delivery, imposing the risks of loss on the bargainee. Phillips v. Moor, 71 Me. 78. To the same effect is the case of Wing v. Clark, 24 Me. 366, where there was a sale of a machine which the vendee sent his agent for, with a team, but the agent, fearing it was too bulky after getting it on his vehicle, left it with the vendor, and it was the same night accidentally destroyed by fire. It was held that the title had passed, and that the vendee must bear the loss. So also in Rothwell v. Alves, 60 Ill. App. 156, there was a sale of a buggy, the price being paid, but owing to the muddy condition of the road the purchaser did not wish to take it away, and the seller, to accommodate him, permitted it to remain at the shop. The court held the title passed, and that a subsequent purchaser under a bill of sale generally, describing all the property at the shop, took no title to the carriage.

In Penley v. Bessey, 87 Me. 530, 33 Atl. R. 21, plaintiff's agent bought a pair of oxen of defendant, saw them and paid for them. Defendant agreed to bring them to plaintiff on a later date. Subsequently, but before delivery of the cattle, one of them, without defendant's fault, died, and the action was brought to recover his value. It was held that the title had passed and the verdict for the plaintiff was set aside.

In Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. R. 112, cattle were bought, paid for and delivered to the vendee, who then redelivered them to the vendor to be cared for by him and driven to market. Before they were so driven they were levied upon by the sheriff, with full notice of the sale, as the property of the vendor. It was held the levy was invalid; that the property in the cattle had passed to the vendee.

Likewise it is held that the purchaser must bear the loss occasioned by a destruction of property which is the subject of sale while in transit from the seller to the purchaser. This is upon the theory that the title passes on delivery of the property to the carrier, this being the last act within the vendor's control. Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. R. 214, 1 L. R. A. 767; Mee v. McNider, 109 N. Y. 500, 17 N. E. R. 424; Lord v. Edwards, 148 Mass. 476, 20 N. E. R. 161.

In Bates v. Elmer Glass Mfg. Co., — N. J. Eq. —, 14 Atl. R. 273, a corporation had received and accepted an order and payment for certain glass. Before it was delivered the concern went into the hands of a receiver. It was held that the contract was complete, and the court ordered the receiver to deliver the goods. So also where plaintiff ordered butter from defendant, who selected and set apart the amount required from a larger quantity, afterward sending a bill of account for the same to the plaintiff, it was held that the sale of the butter was complete and that title passed. Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. R. 117. So plaintiff purchased cattle, taking them in payment of a debt, but not wishing to remove them, left them

the result of the agreement of the parties. As stated by the supreme court of Minnesota,[1] "The rule is that when the chattels are clearly designated and appropriated to the contract,

in care of the vendor until autumn. Meanwhile they were levied upon as property of the vendor, and in a contest between the officer and the vendee seeking to recover the value of the cattle, it was held that the vendee could recover, as he was the owner of the cattle at the time of the levy. Kennedy v. Whittie, 27 Nova Scotia, 460.

In Benedict & Burnham Mfg. Co. v. Jones, 64 Mo. App. 218, defendant's assignor had purchased wire of plaintiffs, but becoming financially embarrassed offered to return what he had bought less a very little that had been sold. Plaintiffs accepted this offer and requested prepayment of freight, and payment for that part of the wire which had been used. Although defendant's assignor was in possession of the goods, in such a condition as to be easily distinguished from the balance of his stock, he neglected to make the shipment, hence the action of replevin was brought for the wire against the assignee. The court held that although the wire was mixed with other stock of the assignor, nevertheless, as it remained in original packages and bore the shipping tags of plaintiffs, it was so clearly distinguishable from the residue of assignor's stock that the title passed to plaintiffs by means of the previous correspondence concerning its shipment. So in Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, where there was a sale of horses to the agent of the furniture company, but the animals were to remain in the care of the vendor for some little time before payment was to be made or the horses delivered, it was held that the title passed without delivery, the price having been fixed and the property being identified. So it was held where hogs were sold while out of the possession of both vendor and vendee, being on the cars in transit to a market, and it was agreed that the consignee should account to the vendee for the price, and he did so account, that the contract of sale was complete; that the title passed, and the vendee was liable for the contract price. Harding v. Manard, 55 Mo. App. 364.

In Sutherland v. Bruce, 73 Fed. R. 624, there was an agreement to trade horses. In pursuance of this contract one of the parties delivered his horse, but the other refused to fulfill his bargain. *Held*, that replevin would lie on behalf of the bargainor who had delivered his horse for the animal for which he traded: that the title had passed and with it the right of possession. Likewise where there was a contract concerning some hogs which were identified by the parties, and in part paid for, it was held that notwithstanding the fact that the swine were left with the vendor, the contract was a sale, the title passed, and the vendee could compel a delivery. O'Farrell v. McClure, — Kan. App. —, 47 Pac. R. 160. So in Lynch v. Daggett, 62 Ark. 592, 37 S. W. R. 227, there was a contract concern-

[1] Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471, citing Hatch v. Oil Co., 100 U. S. 124.

are ready for immediate delivery, and the terms of sale, including the price, are explicitly given, there is an executed contract, and the title to the property, as between the parties,

ing some wagon tongues and other lumber in a pile on the premises of the vendor. It was agreed that vendor should draw this material to the railway for the vendee, and was to receive a fixed price for the pile. The court held that the title passed by the force of the contract, the delivery not being made in no way affecting the title. So, when there was a sale of logs, an unknown quantity in feet, but identified and branded by the purchaser, it was held that the title passed, although there was no manual delivery of the property. Hagins v. Combs, 102 Ky. 165, 43 S. W. R. 222.

In Thayer v. Davis, 75 Wis. 205, 43 N. W. R. 902, there was a sale of a definite number of piles of lumber, at a fixed price per thousand feet. As the property was yet undelivered it was contended that the title did not pass; but the court held that this was immaterial; that from the fact that the agent of the vendee counted the piles and courses in the pile and gave orders for their disposition, an intention to pass the title was shown, and this intention prevailed.

In Gatzmer v. Moyer (Pa. St.), 13 Atl. R. 540, there was a sale of all the standing and fallen timber on a certain tract at a fixed price per thousand feet sawed; the vendee was to do the sawing. After the logs had been gotten out they were levied upon as the property of the vendee, and it was held that the title passed to him by virtue of the contract of sale, and the fact that the timber had not yet been measured was immaterial. Likewise where colts were sold to be subsequently delivered, it was held the title passed and a levy upon them as property of the vendor was void. Kneeland v. Renner, 2 Kan. App. 451, 43 Pac. R. 95.

In Burcham v. Griffeth, 31 Neb. 778, 48 N. W. R. 824, there was a sale of cattle, the price being paid, to be delivered at a future date. While driving them to the place of delivery several were injured without fault of the vendor. *Held*, the title had passed and that the loss was on the vendee.

When liquors were being purchased, from week to week, of a bottler, by a hotel keeper in another city, and the practice was, upon receiving orders for the liquor, to set it aside for the purchaser and charge its price to him, delivery being made either by shipment by rail or by the seller's wagon, and the seller, who had no license to sell liquor in the county of the purchaser's domicile, was indicted for selling liquor there without a license, the question was, When was the contract of sale complete? When did the title pass to the purchaser? If it passed only upon delivery the law was violated. The court said there was no violation; that the sale was complete in the county of the seller's domicile, and that the title there passed to the purchaser. Com. v. Hess, 148 Pa. St. 98, 23 Atl. R. 977.

On the other hand, where it is the evident intention of the parties that title is not to pass until delivery, as where charcoal is to be paid for on delivery at a particular point, the title will not pass until the terms of

passes to the purchaser, even without actual payment or delivery."[1]

§ 494. ——. The payment of the price may, however, be made either expressly or impliedly a condition precedent to the passage of the title; and when such is the case, the condi-

the contract are complied with. (See next chapter.) Diehl v. McCormick, 143 Pa. St. 584, 22 Atl. R. 1033. Or when the contract does not clearly evidence an intention to pass the title, as where one told another he might take a certain mule in payment of a debt, and the other said he would, but there was no further act showing passage of title, it was held to be no sale of the property. Weedon v. Clark, 94 Ala. 505, 10 S. R. 307. Likewise where there was a contract for the sale and purchase of a full boatload of coal slack, it was held that the title to the property did not pass as fast as the boat was loaded, for until fully loaded the contract was executory. It was the intention of the parties that the property should all be in the boat before the title passed. Hays v. Pittsburgh, etc. Packet Co., 33 Fed. R. 552.

However when the property which is the subject of the contract of sale is on realty owned by the vendee and in place where it will be used, as mining machinery at the head of a mine, the title will pass without delivery. Hall v. Morrison, 92 Ga. 311, 18 S. E. R. 293. Or, as in the case of lumber yet to be sawed from logs and piled on sticks in vendor's yard, the title will pass to the vendee when the lumber is so piled, and he will be entitled to its possession. Martz v. Putnam, 117 Ind. 392, 20 N. E. R. 270.

[1] In Hayden v. Demets, 53 N. Y. 426, it is said: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor." In Clark v. Greeley, 62 N. H. 394, it is said: "As a general rule, under a contract of sale of specific chattels at a stipulated price, when nothing remains to be done to designate the property sold or the price to be paid, the title, independently of the statute of frauds, immediately vests in the buyer and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Clark v. Draper, 19 N. H. 419, 421; Bailey v. Smith, 43 N. H. 141, 143; Townsend v. Hargraves, 118 Mass. 325, 332; Phillips v. Moor, 71 Me. 78; Dixon v. Yates, 5 B. & Ad. 313, 340. Although the title passes so as to subject the buyer to the risk of future injury to the property, the right of possession does not pass, but is dependent upon the payment of the price. In the absence of any agreement, payment and delivery are to be concurrent acts, and the seller has the right to retain the possession until the price is paid." In Olyphant v. Baker, 5 Denio (N. Y.), 379, it is said by Beardsley, C. J.: "It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the

tion will be operative unless its provisions are waived, as will be seen in the following chapter;[1] but in the absence of such a condition the title passes, as already stated.

§ 495. ——. The passing of the title must nevertheless be constantly distinguished from the delivery of the possession. For, though the title may have passed, it may well be, as will be seen hereafter,[2] that the vendor, by virtue of his vendor's lien, is entitled to retain possession of the goods until the price is paid. The title to the goods, the liability to pay for them, and the risk of their loss, may thus all be in the buyer, while the right to the price and to retain possession of the goods to secure its payment may be in the seller. And this being true, it is of course clear that where all the elements of an actual sale, as distinguished from an executory agreement, are present, there is nothing inconsistent in an express stipulation that the seller shall retain possession until, and as security for, the payment of the price.[3]

§ 496. —— **Or though something remains to be done to ascertain the price.**—As will be seen hereafter,[4] it is well settled that when something remains to be done by the seller, such as counting, weighing or measuring, which is necessary in order to identify the goods or separate them from a larger mass of which they form a part, the title will not pass until such act is done, for the reason that until that act is done the goods are not ascertained or identified.[5] But where the entire mass is sold, and must be counted, weighed or measured simply with a view to the ascertainment of the price for the purpose of a settlement, though this act may be presumptively a

right of property, although the price has not been paid nor the thing sold delivered to the purchaser." To the same effect: Phillips v. Moor, 71 Me. 78; Towne v. Davis, 66 N. H. 396, 22 Atl. R. 450; Bertelson v. Bower, 81 Ind. 512; Jenkins v. Jarrett, 70 N. C. 255; Barrow v. Window, 71 Ill. 214; Thayer v. Davis, 75 Wis. 205, 43 N. W. R. 902; Sweeney v. Owsley, 14 B. Mon. (Ky.) 332; Leonard v. Davis, 1 Black (U. S.). 476.

[1] See *post*, ch. III.

[2] See *post*, § 1474.

[3] Arkansas Cattle Co. v. Mann (1888), 130 U. S. 69.

[4] See *post*, § 520.

[5] See *post*, § 520.

condition precedent, as will be seen hereafter,[1] the weight of authority is to the effect that the title may pass at once if such appears to have been the intention of the parties, although the goods have not been delivered and the act in question has not been done.[2] The distinction is found between a specific commodity and an indefinite one.[3]

§ 497. ——. This distinction was forcibly put in a leading case[4] as follows: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title passes. If a flock of sheep be sold at so much a head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is done as upon the object which is to be effected by it. If that be specification, the property is not changed; if it be merely to ascertain the total value at designated rates, the change of title is effected."

§ 498. ——. What is thus true where the act is to be done by the seller is equally true where it is to be performed by the buyer. Thus, where definite terms are agreed upon concerning specific goods, the title may pass at once, unless a contrary intention appears, even though, as in the case of the sale of a

[1] See *post*, § 525.

[2] Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Crofoot v. Bennett, 2 N. Y. 258; Francis-Chenoweth Hardware Co. v. Gray, 104 Ala. 236, 15 S. R. 911; Greene v. Lewis, 85 Ala. 221, 7 Am. St. R. 42; Hagins v. Combs, 102 Ky. 165, 43 S. W. R. 222; Burke v. Shannon (Ky.), 43 S. W. R. 223; Kohl v. Lindley, 39 Ill. 195; Graff v. Fitch, 58 Ill. 373, 11 Am. R. 85; Cook v. Van Horne, 76 Wis. 520, 44 N. W. R. 767; Welch v. Spies, 103 Iowa, 389, 72 N. W. R. 548.

[3] Cunningham v. Ashbrook, 20 Mo. 553; Cleveland v. Williams, *supra;* Crofoot v. Bennett, *supra.*

[4] Crofoot v. Bennett, 2 N. Y. 258.

stack of hay, the buyer is yet to weigh or bale it.[1] In a Kentucky case,[2] marked "not to be officially reported," the court said: "Where one purchases personal property of another, and the buyer leaves it with the seller until the performance of

[1] Burke v. Shannon (Ky.), 43 S. W. R. 223; Kohl v. Lindley, 39 Ill. 195; Phillips v. Moor, 71 Me. 78.

[2] Burke v. Shannon, *supra*.

It is said in Joyce v. Adams, 8 N. Y. 291: "It is a general rule of law that where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without payment of the price. But if anything remains to be done on the part of the seller, as between him and the buyer, such as weighing, measuring or counting out of a common parcel before the goods purchased are to be delivered, until that is done the right of property has not attached in the buyer, and the future risk, of course, remains with the seller." In this case the price was undetermined and the contract did not provide the method of determining it; so it was held that the risk was with the seller. On the other hand, in the application of a like rule in Burke v. Shannon (Ky.), 43 S. W. R. 223, the court held the risk of loss was in the purchaser when the duty fell upon him to ascertain the price in a method which the contract provided. So also where butter in firkins was sold at a fixed price per firkin it was held the title had passed without payment of the price for which the buyer was liable. Seckel v. Scott, 66 Ill. 106.

Where the contract furnished a criterion for ascertaining the price, as when on any day the seller might name it should be a certain amount less than the price of like articles on that day at another city, it was held that the property passed to the vendee upon delivery of the goods, although the amount of the price was not fixed. McConnell v. Hughes, 29 Wis. 537. Likewise, where a certain barn of hay was sold at a fixed price per ton, the buyer to weigh the hay, it was held the title passed, and, although the property was destroyed, the buyer was liable for the price. Phillips v. Moor, 71 Me. 78. So in Francis-Chenoweth Hardware Co. v. Gray, 104 Ala. 236, 15 S. R. 911, where there was a sale of a stock of goods in payment of a debt, the goods yet to be inventoried and the price thus determined to be so applied to the payment, any discrepancies to be paid to the party in whose favor they might exist, it was held that the title passed and that the goods were not liable to seizure by the vendor's creditors. To the same effect was the case of Pacific Lounge Co. v. Rudebeck, 15 Wash. St. 336, 46 Pac. R. 392, in which there was a sale of property in payment of the vendor's debt to the purchaser, and it was held that the title passed and that the vendee might maintain replevin against a lessee of the vendor, who was in default under the lease, for the recovery of the goods. Likewise, when property is sold and delivered to the purchaser "for a reasonable price," the title will nevertheless pass

subsequent acts by the buyer, such as weighing, measuring, or otherwise ascertaining the quantity, it is left at the risk of the buyer, unless there is an express contract to the contrary; the title having passed immediately upon the trade being closed."

§ 499. The question is one of intention.— It has been decided,[1] said Judge Cooley in one case,[2] "that the question whether a sale is completed or only executory is usually one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale; that where the goods sold

to the purchaser, notwithstanding the fact that the price be undetermined. Greene v. Lewis, 85 Ala. 221, 4 S. R. 740, 7 Am. St. R. 42; Phifer v. Erwin, 100 N. C. 59, 6 S. E. R. 672.

In Sanger v. Waterbury, 116 N. Y. 371, 22 N. E. R. 404, it was held that where a certain number of bags of coffee were bought to be taken from a larger number of bags, but so marked as to be easily distinguishable, the title passed, although the coffee must needs be weighed for the purpose of ascertaining the price. Likewise, when standing timber was bought for the purpose of being converted into wood, to be paid for at so much a cord, the title passes to the wood that is cut and the price of this may be recovered although it be destroyed by fire. Upson v. Holmes, 51 Conn. 500.

Where all the corn in two cribs was sold at so much a bushel, the title may pass at once, if such appears to be the intention, even though the seller has the right to retain for his own use two or three hundred bushels. Welch v. Spies, 103 Iowa, 389, 72 N. W. R. 548.

[1] In Lingham v. Eggleston, 27 Mich. 324.

[2] Byles v. Colier, 54 Mich. 1 [referring, for the same conclusion, to Hatch v. Fowler, 28 Mich. 205; Hahn v. Fredericks, 30 Mich. 223, 18 Am. R. 119; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants' Bank, 35 Mich. 515; Scotten v. Sutter, 37 Mich. 526; Carpenter v. Graham, 42 Mich. 191; Brewer v. Salt Association, 47 Mich. 526. Judge Cooley refers also to Kelsea v. Haines, 41 N. H. 246; Southwestern Freight Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Shelton v. Franklin, 68 Ill. 333; Straus v. Minzesheimer, 78 Ill. 492; Crofoot v. Bennett, 2 N. Y. 258; Groat v. Gile, 51 N. Y. 431; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. R. 42; Dennis v. Alexander, 3 Pa. St. 50; Galloway v. Week, 54 Wis. 604; Caywood v. Timmons, 31 Kan. 394]. To same effect also: Hood v. Bloch, 29 W. Va. 244, 11 S. E. R. 910; Wadhams v. Balfour, 32 Oreg. 313, 51 Pac. R. 642; Barker v. Freeland, 91 Tenn. 112, 18 S. W. R. 60; Restad v. Engemoen, 65 Minn. 148, 67 N. W. R. 1146; Wagar v. Detroit, etc. R. Co., 79 Mich. 648, 44 N. W. R. 1113; Day v. Gravel (1898), 72 Minn. 159, 75 N. W. R. 1; Boswell v. Green, 25 N. J. L. 390; Pacific Lounge Co. v. Rudebeck, 15 Wash. 336, 46 Pac. R. 392.

are designated, so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either, should be determined; these being circumstances indicating intent, but not conclusive; but that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be accepted."

Many other cases, some of which are referred to in the note, show how fully the question is one of the intention of the parties.[1]

[1] In Towne v. Davis, 66 N. H. 396, 22 Atl. R. 450, the question was whether the title had passed to a quantity of hay sold at auction. "This," said the court, "is a question of the intention and understanding of the parties, which is a question of fact. A referee has found that the title did not pass, and the verdict must stand if there was evidence competent to sustain it.

"As between the parties, neither delivery nor payment is necessary to a completed sale except when required by the statute of frauds. Clark v. Draper, 19 N. H. 419, 421; Bailey v. Smith, 43 N. H. 141, 143; Clark v. Greeley, 62 N. H. 394. At the common law an agreement for the present sale of specific chattels casts on the buyer the risk of loss. But if anything remains to be done between the parties to identify the goods sold, or to determine the price to be paid, the sale is not complete so as to pass the title, unless it may be inferred from the evidence that the parties intended the title should pass at once. If the goods are sold by number, weight, measure, or the like, the sale is *prima facie* not complete till the quantity is ascertained, and if they are mixed with others, not until they are separated and designated. Warren v. Buckminster, 24 N. H. 336; Fuller v. Bean, 34 N. H. 290; Ockington v. Richey, 41 N. H. 275; Prescott v. Locke, 51 N. H. 94.

"The general doctrine on this subject is, that when something remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale,

§ 500. Rules for determining the intention.—In order to aid in ascertaining the intention in doubtful cases, certain rules have been formulated, based upon the presumed intention of

the performance of such act is a prerequisite to the consummation of the contract; and until it is performed the property does not pass to the vendee. But in the case of sales where the property to be sold is in a state ready for delivery, and the payment of money or giving security therefor is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a case presents a question of the intention of the parties to the contract. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the rate agreed upon. Riddle v. Varnum, 20 Pick. (Mass.) 280, 283, 284.

"The terms of the sale were 'cash or a bankable note,' and this fact is to be considered in determining whether the parties intended a completed sale. If by the use of these terms the parties understood merely that no credit was to be given, and that the seller would insist on his right to retain possession of the hay until the price was paid or secured, the sale might still be so far completed and absolute that the property would pass; but if it was the understanding that the hay was to remain the property of the seller until the price was paid or secured, the sale was conditional, and the title would not pass, even on delivery, without performance of the condition. Clark v. Greeley, 62 N. H. 394, 396.

"In Paul v. Reed, 52 N. H. 136, the buyer, moving into the seller's house, examined and selected a hog, some butter, sugar, tea and other articles, and agreed to take them at certain prices. He mixed the sugar with his own, changed the hog to another pen, and took out his pocket-book to pay for them; but at that moment the money due for the price was attached by a creditor of the seller, and the seller took back his goods. The question was whether the title was vested in the purchaser. The court say: 'The question then is whether the delivery here was absolute, intending to pass the title to the vendee and trust him for the price, or whether it was made with the expectation that the cash would be paid immediately on delivery. This is a question of fact, but it is submitted to the court for decision. Ordinarily it should be passed upon at the trial term.' . . . Assuming that the questions both of law and fact were reserved, the court found that the goods were sold for cash, and of course that the delivery of the goods and the payment of the price were to be simultaneous; and that when a part had been delivered, and the seller was figuring up the amount and the buyer had taken out his money to pay the price, the act was arrested by the service of process, the sale was not completed, and the title had not vested in the buyer."

the parties in such cases, which will often be of service in making the issues clear, or will turn the scales where they would otherwise be balanced.

Many cases, of course, need no such aid; for the parties have themselves made their intention plain. In many cases, also, the parties have expressly interposed conditions in the way of the transfer of the title,—and these will be considered in the following chapter; but the rules in question are not designed to apply to cases of that nature. They are designed to aid in answering this question: Where the parties have bargained concerning specific chattels, but have not by their contract imposed express conditions, or otherwise made their intention clear, when will the title pass?

The rules, moreover, it must be understood, are not fixed principles of law, but simply presumptions as to intention, to be applied where the intention of the parties is not already clear. They must, therefore, like similar rules which govern in the construction of wills, be applied constantly subject to this proviso: —"unless a contrary intention appears."

§ 501. ——. **These rules** have been stated in many forms, but, in substance, including the proviso, they are:

1. Where the terms of the contract have been definitely agreed upon, and the goods have been specifically ascertained, and nothing remains to be done by the seller except to deliver the goods, or by the buyer except to pay for them, the title will, unless a contrary intention appears, vest at once in the buyer, even though the goods have not been delivered or paid for.

In this case, as has been seen, the buyer may retain possession until the goods are paid for; but it is possession which he thus retains and not title.

2. Where, by the agreement, the vendor of specific goods is bound to do something to the goods for the purpose of putting them into that condition in which the buyer is bound to accept them, the title will not pass, in the absence of evidence showing an intention to the contrary, until such thing is done.

3. Where, though the specific goods are in a deliverable con-

dition, there still remains some act, like measuring, weighing or testing, in order to determine the price, where the price is to depend upon the quantity or quality of the goods, the title usually will not pass, in the absence of evidence of an intention to the contrary, until this act is done.

The first of these rules has been already considered in the present chapter; the other two, with many other forms of more express conditions, will be dealt with in the following chapter.

§ 502. Question of intention, by whom decided.— The question of the intention of the parties is usually one to be determined from all the facts and circumstances surrounding the particular case, and, like such questions generally, is pre-eminently a question to be determined by a jury.[1]

Where, however, the facts are not disputed, and the only question is one as to their legal effect, the determination is for the court.[2] And so where the whole contract is reduced to writing, the question whether it operates as a present transfer of the title is likewise for the court.[3]

[1] Riddle v. Varnum, 20 Pick. (Mass.) 280; Lingham v. Eggleston, 27 Mich. 324; Byles v. Colier, 54 Mich. 1; Cunningham v. Ashbrook, 20 Mo. 553; Bates v. Conkling, 10 Wend. (N. Y.) 389; Olyphant v. Baker, 5 Denio (N. Y.), 379; Bogy v. Rhodes, 4 Greene (Iowa), 133; Towne v. Davis, 66 N. H. 396, 22 Atl. R. 450; Kneeland v. Renner, 2 Kan. App. 451, 43 Pac. R. 95; Graff v. Fitch, 58 Ill. 373, 11 Am. R. 85.

In Kneeland v. Renner, *supra*, the court said: "In a contract of sale of personal property the intent of the parties controls, and if they intended a present vesting of the title, the title may in fact pass at once to the purchaser, although the actual delivery is to be made subsequently; and whenever a dispute arises as to the true character of the agreement, the question of intent is rather one of fact than one of law; and the finding of the trial court, when sustained by the evidence, will not be disturbed upon review." To same effect, O'Farrel v. McClure, — Kan. App. —, 47 Pac. R. 160; Towne v. Davis, *supra*.

[2] Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Wigton v. Bowley, 130 Mass. 252; Kerr v. Henderson, 62 N. J. L. 724, 42 Atl. R. 1073; Smalley v. Hendrickson, 29 N. J. L. 371.

[3] Leonard v. Davis, 1 Black (U. S.), 476; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471; First Nat. Bank v. Reno, 73 Iowa, 145, 34 N. W. R. 796; Ruthrauff v. Hagenbuch, 58 Pa. St. 103.

CHAPTER III.

OF THE CONDITIONAL SALE OF SPECIFIC CHATTELS.

§ 503. Purpose of this chapter.
504–506. What classes of cases to be considered.

I. Where Goods are to be Prepared for Delivery.

507, 508. Where specific goods are to be completed or prepared for delivery, no title passes until this is done.
509–511. Unless a contrary intention appears.
512. —— But title will pass when required act is done.
513. Effect of part performance of condition.
514. Effect of earnest or part payment.

II. Where Goods are to be Measured, Weighed or Tested.

515–517. Title to goods not delivered presumptively does not pass if goods are yet to be weighed, measured or tested to ascertain price.
518. —— Presumption not conclusive.
519. —— Broader rule in some States.
520, 521. Nor where goods are yet to be measured, etc., with a view to identification.
522, 523. Nor where goods are yet to be measured, etc., in order to ascertain if they comply with contract.
524. By whom weighing, etc., to be done.
§ 525–527. How where whole body of goods is delivered to buyer.
528. —— What delivery sufficient.
529, 530. —— How when contemplated method fails.
531. Effect of part performance.
532. Effect of earnest or part payment.

III. Where Buyer is to do Something Other than to Pay Price.

533. What here included.
534, 535. Title will not pass till act performed.
536. Unless a contrary intention appears.

IV. Where Payment of Price is a Condition Precedent.

537. What here included.

1. *Payment of Price as Implied Condition Precedent.*

538, 539. In general — Payment as condition precedent when sale for cash.
540. Payment as implied condition where sale expressly for cash.
541. —— Meaning of "cash sale."
542. —— Title may pass though possession retained — Payment and delivery concurrent.
543, 544. —— Or title may not pass until payment.
545. —— Check or draft not payment.

§ 546, 547. Giving of note or security as condition precedent.
548. —— Consideration for condition.
549. Waiver of condition of payment or security.
550. —— Delivery to carrier as waiver.
551–553. Further of waiver.
554. Goods may be retaken if condition not performed.
555. —— Even from *bona fide* purchaser.
556. —— Clearly from attaching creditors, etc.
557. —— Usage does not defeat.

2. *Payment of Price as Express Condition Precedent, and herein of "Conditional Sales" or "Instalment Contracts."*

558. Formal contracts of so-called "conditional sales."
559. Confusion respecting name.
560. What is a conditional sale.
561, 562. —— What varieties possible.
563. —— What here meant by "conditional sale."
564. Validity and form of "conditional sale."
565. —— Contract in form absolute shown to be conditional.
566. —— Express promise to pay does not render absolute.
567. Construction of such contracts.
568. —— Declaration of parties not conclusive.
569–571. —— Instruments in form of lease held conditional contracts to sell.
572, 573. —— Instruments in form of lease held sales upon condition subsequent.
574–576. —— Instruments in form of lease held absolute sales reserving lien or chattel mortgages.
§ 577–579. —— Instruments in form of conditional sale held absolute reserving lien or mortgages.
580, 581. —— The rule in Pennsylvania.
582. —— Bailment and conditional sale distinguished.
583. —— Conditional sale and chattel mortgage distinguished.
584. —— The true theory.
585. On conditional contract to sell no title passes until performance.
586. —— Note not payment.
587. Nature of interest acquired by vendee.
588. —— Whether assignable or leviable.
589. —— Entitled to legal protection.
590. —— Performance of condition inures to benefit of transferee.
591. Nature of interest retained by vendor.
592. —— Interest may be sold, seized, etc.
593. —— May assign interest with contract.
594–596. The right of possession.
597, 598. Condition good against creditors of vendee.
599, 600. Condition good against *bona fide* purchaser.
601, 602. —— But not where goods bought for resale.
603, 604. Statutes requiring filing or recording of contract.
605. Default by purchaser — What constitutes.
606–608. Effect of vendee's default.
609–612. Waiver of default by seller.

§ 613, 614. Remedies of seller upon default.
615. What choice offered.
616. Election of remedy.
617. —— Rescission.
618. —— Recaption.
619. —— Personal action.
620–623. Does recovery of goods bar action for price?
624. —— Waiver by vendor of right to retake property.
625. Vendee usually has no election.
626, 627. Vendee's right to take possession on default — Entry on premises — License.
628. Necessity of demand before recovery.
629. Return of payments if property retaken by seller.
630. —— Equities of purchaser.
631. —— How when action against third person.
632, 633. —— Return of notes received.
634, 635. Destruction of property before payment.
636. Additions to or increase of property before payment.
637. —— Additions to stock of goods sold.
638–641. Changes in form or nature of property.
642. Accession and confusion of goods.
643. Substitution of goods.
644–647. Effect of annexing goods to land.
648–650. Conflict of laws.

V. Contracts of Sale Subject to Other Conditions.

651. In general.

1. *Sale of Goods "to Arrive."*

652. Such contracts conditioned on arrival of the goods.
§ 653. Contracts limiting time of shipment.
654. Giving notice of name of ship.
655. Classification of cases.

2. *Sale of Goods "to be Shipped."*

656. Such contracts conditional.

3. *Sale on Approval.*

657. Sale, if goods are approved.
658. Title and risk pending approval.
659. Within what time option to be exercised.
660. Effect of failure to return within time fixed.
661. Necessity for notice of disapproval.
662. How notice to be given.

4. *Sale if Goods Satisfactory to Buyer.*

663. Sale if buyer satisfied.
664. Who to be satisfied.
665. If buyer not satisfied, no sale.
666. Reasons for his dissatisfaction.
667. Duty to test goods.
668. Duty to act in good faith.
669. Within what time decision to be made.
670. Duty to give notice or return.
671. How buyer's satisfaction indicated.

5. *Sale of Goods Approved by Third Person.*

672. No sale unless goods approved.
673. Third person must act in good faith.

6. *Sale of Goods to be Appraised.*

674. Title does not pass until appraisal.

7. *Sale or Return.*

675, 676. Sale with option to return or pay.

§ 677. Nature of title acquired by vendee — Risk of loss.
678. Option usually vendee's only — Security of seller.
679. —— Stipulations reserving title.
680. Form of option.
681. Within what time option exercised.
682. Effect of not returning in time prescribed.
683. How, when buyer puts it out of his power to return.
684. How, when return becomes impossible.
685. How return effected.

8. *Sale with Option in Vendee to Retake.*
686. Title in vendee until option exercised.
687. Waiver of option.

9. *Sale with Right in Vendee to Repurchase.*
688. Title in vendee until right exercised.
689. Such contracts strictly construed.
690. Within what time right exercised.
691. Interests in goods before repurchase.

10. *Sale to be Void if Vendor Pays.*
692. Such contracts valid.

11. *Sale to be Void if Vendee Does Not Pay.*
693. Such contracts valid.

§ 503. Purpose of this chapter.— In the preceding chapter there has been considered the case of the unconditional sale of a specific chattel. But, as has been already intimated, this is but one of a number of forms which the contract may assume, each of which requires special consideration. The one most closely allied to the form discussed in the foregoing chapter is, perhaps, the case in which the chattel is, as there, identified and certain, but in which the contract for its sale is subject to conditions, express or implied, and either precedent or subsequent.

§ 504. What classes of cases to be considered.— The forms which the conditional contract of sale may assume are various. Two classes of cases were, by Lord Blackburn, said to arise, for which he laid down the following rules, the substance of which has already been referred to in another connection in the preceding chapter:

First. Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them,

or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

Secondly. Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

But this rule has not been followed to this extent in this country, as will be seen, and Lord Blackburn himself did not approve of it.[1]

[1] Lord Blackburn says of these rules: "The first of these rules seems to be founded in reason. In general, it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser, and as the vendor may still retain possession of the goods so as to retain a security for the payment of the price, the transference of the property is to the vendor pure gain. It is therefore reasonable that where, by the agreement, the vendor is to do something before he can call upon the purchaser to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be that the vendor was to do this before he obtained the benefit of the transfer of the property. The presumption does not arise if the things might be done after the vendor had put the goods in the state in which he had a right to call upon the purchaser to accept them, and would be unreasonable where the acts were to be done by the buyer, who would thus be rewarded by his own default.

"The second rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in that distinction.

"In general, the weighing, etc., must from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the in-

§ 505. ——. To these two rules of Lord Blackburn, Mr. Benjamin added a third, as follows:

Thirdly. Where the buyer is by the contract to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

The thing which the buyer is thus to do under this rule is, usually, to pay the price; but it may be something else, as will be seen.

To these three must clearly be added another, as follows:

Fourthly. Where, by the terms of the contract, any other act or event is made a condition of the passing of the title, the property will not pass unless and until such act or event happens or the performance is waived.

§ 506. ——. These cases will be seen to be, in brief:

1. Where the seller is yet to prepare the goods for delivery. 2. Where something remains to be done to ascertain the price. 3. Where the buyer is to do something, other than to pay the price, before he acquires the title, even though he may already have possession. 4. Where the buyer is to pay the price before he acquires the title. 5. Where the sale is made upon some other condition.

Taking these up in their order, there may be considered —

I.

Where Goods are to be Prepared for Delivery.

§ 507. **Where specific goods are to be completed or prepared for delivery no title passes until this is done.**— Where, though the goods are identified, the seller is, by the terms of

tention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided it be of value." Blackburn on Sales, 175.

the contract, to do something to them, other than merely counting, weighing, measuring, and the like, to finish the goods or prepare them for delivery in the form or condition in which, by the terms of the contract, they are to be delivered (not yet speaking of contracts for the manufacture of goods not in existence), the first of the rules as laid down by Lord Blackburn applies; and the title will not pass until the thing required has been done, even though the goods are paid for, unless, from the terms of the contract or the conduct of the parties, a contrary intention clearly appears.

§ 508. ——. Thus if cattle contracted to be sold are yet to be fattened,[1] or cotton sold is to be ginned and baled,[2] or charcoal partly burned is to be completed,[3] or hides partly tanned are to be finished,[4] or fish contracted for are to be dried,[5] or oats are yet to be threshed,[6] or the goods are to be brought to a certain place,[7] by the seller before delivery, the title will not

[1] Restad v. Engemoen (1896), 65 Minn. 148, 67 N. W. R. 1146; Rourke v. Bullens (1857), 8 Gray (Mass.), 549.

[2] Smith v. Sparkman (1878), 55 Miss. 649, 30 Am. R. 537; The Elgee Cotton Cases (1874), 22 Wall. (U. S.) 180; Screws v. Roach (1853), 22 Ala. 675.

[3] Hale v. Huntley (1849), 21 Vt. 147.

[4] Pritchett v. Jones (1833), 4 Rawle (Pa.), 260.

[5] Foster v. Ropes (1872), 111 Mass. 10.

[6] Groff v. Belche (1876), 62 Mo. 400.

[7] McDonald v. Hewett, 15 Johns. (N. Y.) 349, 8 Am. Dec. 241; Acraman v. Morris, 8 C. B. 449; Miller v. Seaman, 176 Pa. St. 291, 35 Atl. R. 134; North Pac. Lum. Co. v. Kerron, 5 Wash. 214, 31 Pac. R. 595; McClung v. Kelley, 21 Iowa, 508; Johnson v. Bailey, 17 Colo. 59, 28 Pac. R. 81. But see as to this, § 487, *ante;* Terry v. Wheeler, 25 N. Y. 520; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471.

So where wheat, bargained for in the stack, is yet to be threshed, transported to a certain place and there weighed, and then to be transported to another place for delivery by the bargainor, it does not, as matter of law, become the property of the bargainee at the time the contract is made. Caywood v. Timmons (1884), 31 Kan. 394. So a contract for logs not yet cut, but to be cut and scaled, passes no present interest. Martin v. Hurlbut (1864), 9 Minn. 142. Where a contract is made for the sale of a crop of wool, to be put in bags and weighed, the contract is executory. Straus v. Ross (1865), 25 Ind. 300. So, where an "unprised crop of tobacco" has still to be prepared for delivery and weighed, title does not pass by a contract of sale. Jennings v. Flanagan (1837), 5 Dana (Ky.), 217, 30 Am. D. 683. So, where a wagon is sold, to which certain parts are to be added, no present interest passes. Allman v. Davis (1841), 2 Ired. (N. C.) 12. Where a

pass, in the absence of a clear intention to the contrary, until these respective acts have been performed.

§ 509. —— **Unless a contrary intention appears.**— It is unquestionable, however, that a person *may* buy a chattel in an unfinished condition, and acquire the right of property in it, although possession be retained by the seller to fit it for delivery. "But in such a case," said the supreme court of the United States, "the intention to pass the ownership by the contract cannot be left in doubt. The presumption is against such an intention."[1]

§ 510. ——. On the ground, therefore, that the intention to pass the title at once was clear, it was held[2] where a buggy in an unfinished condition was bargained for and the full price paid, but the buggy was left in the maker's possession to be painted, that the title had at once passed to the buyer, though the court relied upon the English cases of *Clarke v. Spence*[3] and

seller is to feed hogs, and weigh and deliver them, title does not pass. Lester v. East (1875), 49 Ind. 588. So, too, where wood is contracted for before it is all cut, to be measured and delivered to the vendee by the choppers when they have finished the chopping, there is no present sale. Frost v. Woodruff (1870), 54 Ill. 155. And where a vendor agrees to sell all the grain harvested by him, both that which has been and that which is to be harvested, and sack it, and carry it to a specified place, the contract passes no title to the property. Hamilton v. Gordon (1892), 22 Oreg. 557, 30 Pac. R. 495. So, where stone is to be kept in a warehouse, storage charges paid by the vendor, and the stone delivered to the vendee when wanted, the contract is merely executory. Malone v. Minn. Stone Co. (1887), 36 Minn. 325, 31 N. W. R. 170. So, a contract for the purchase of a cutter which is to be finished and delivered within a certain time does not vest the title in the vendee. Halterline v. Rice (1863), 62 Barb. (N. Y.) 593. And, where coal is purchased under the stipulation that the contract shall not be binding unless the coal is delivered in accordance with the offer of an agent as set forth in a letter of a certain date, no property passes. Neldon v. Smith (1873), 36 N. J. L. 148.

[1] The Elgee Cotton Cases, 22 Wall. (U. S.) 180.

[2] Butterworth v. McKinly, 11 Humph. (Tenn.) 206. To like effect: Paine v. Young, 56 Md. 314. Compare Halterline v. Rice, 62 Barb. (N. Y.) 593, in preceding section.

[3] 4 Ad. & El. 448.

Woods v. Russell,[1] which, as will be seen,[2] have not been generally approved in the United States.

§ 511. ——. "In all cases, however," said the supreme court of Massachusetts,[3] "the intention of the parties as to the time when the title is to pass can be ascertained only from the terms of the agreement, as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. The rights of the parties under the contract cannot be affected by their undisclosed purposes, or by their understanding of its legal effect."

§ 512. —— **But title will pass when act required is done.** But although the title, in the absence of a contrary intention, will thus not pass until the act required has been performed, yet when that act *is* fully performed so that nothing further remains to be done to put the goods into that state, place or condition in which the purchaser is bound to accept them, the title will then pass.[4]

§ 513. **Effect of part performance of the condition.**— Ordinarily the fact that a part of that which was to be done has been performed is ineffectual to pass the title, unless the performance of the residue has been waived. Where the contract is entire, the vendee is not obliged to accept a part performance, but may insist upon the whole; and the vendor who is seeking to enforce the contract must show a full performance on his part or a waiver of it by the vendee.[5] And even if part of the goods, under an entire contract, having been fitted for delivery, are actually delivered to the vendee, it has been held that no title to that part passes in the absence of evidence that the vendee has accepted that part and waived the delivery of the remainder.[6]

[1] 5 B. & Ald. 942.

[2] See *post*, § 754, note,

[3] Foster v. Ropes (1872), 111 Mass. 10.

[4] Bond v. Greenwald (1871), 4 Heisk. (Tenn.) 453; Groff v. Belche (1876), 62 Mo. 400.

[5] The Elgee Cotton Cases (1874), 89 U. S. (22 Wall.) 180. See also § 1398.

[6] Kein v. Tupper (1873), 52 N. Y. 550.

In Kein v. Tupper, *supra*, the contract was for one hundred and nine-

§ 514. Effect of earnest or part payment.— The fact that earnest has been given or part payment made will not operate to pass the title in these cases. The only effect of earnest is to confirm the contract, and the question whether the title has passed under that contract remains as before.[1]

teen bales of cotton to be fitted for delivery. Seventy bales only were taken out of the warehouse, weighed and samples taken, and returned to the warehouse, and then further work was postponed until next day. That night the warehouse burned and all the cotton was damaged or destroyed. The action was for the price of the seventy bales. The court said: "But if there was a delivery of seventy bales, the action could not be sustained. The contract was entire, and the plaintiffs [the sellers] must prove performance to entitle them to recover. The defendants purchased one hundred and nineteen bales, to be paid for when delivered. Until the delivery of the whole quantity no action accrued to the plaintiffs. While the destruction of the subject-matter of the contract, without fault of the plaintiffs, would relieve them from an action for damages for not performing the contract, yet it would not enable them to enforce a part performance against the defendants. (Dexter v. Norton, 47 N. Y. 62.) The rule is well settled in this State that, upon a contract for the delivery of a specified quantity of property, payment to be made on delivery, no action will lie until the whole is delivered. (Champlin v. Rowley, 13 Wend. 259; Mead v. Degolyer, 16 Wend. 632; Russell v. Nicoll, 3 Wend. 112; Baker v. Higgins, 21 N. Y. 397; Norton v. Woodruff, 2 N. Y. 153.) The English rule, that a recovery may be had for the portion delivered, if retained until after the time for full performance (as held in Oxendale v. Wetherell, 9 B. & C. 386, 17 Eng. Com. L. 177, and other cases), has never been adopted, but expressly repudiated by the courts of this State. (See cases cited *supra*.) That rule rests upon no solid foundation, and in effect enables courts to alter the terms of contracts as made by parties.

"The right of a vendor to demand the portion delivered in a case of the destruction of the remainder, so that full performance by the vendor is impossible, need not be considered, because in this case the plaintiffs had all the cotton claimed to have been delivered, which was not destroyed. A vendee may accept a delivery of a part of the property, and waive the delivery of the remainder, and this may be shown by circumstances; but in this case there is not the slightest circumstance tending to establish such acceptance and waiver. Both parties expected to perform the contract in full. The unfortunate accident prevented it before the title had passed from the vendors, and the misfortune is theirs."

[1] The Elgee Cotton Cases (1874), 89 U. S. (22 Wall.) 180; Nesbit v. Burry (1855), 25 Pa. St. 208; Jennings v. Flanagan (1837), 5 Dana (Ky.), 217, 30 Am. Dec. 683.

II.

Where Goods are to be Measured, Weighed or Tested.

§ 515. Title to goods not delivered presumptively does not pass if goods are yet to be weighed, measured or tested in order to ascertain price.— The question of the passing of title to goods not delivered, which are yet to be weighed, measured or tested in order to ascertain the price, is one upon which the English and American courts are not in harmony, nor are all of the cases in this country consistent.

Lord Blackburn's second rule, as has been seen,[1] declared that where anything remains to be done to the goods for the pur-

[1] See *ante*, § 504. In Hanson v. Meyer, 6 East, 614, a lot of starch lying in a warehouse had been sold at so much per hundred weight, and the seller had directed the warehouseman to weigh and deliver it. After part had been weighed and delivered the buyer became bankrupt, whereupon the seller refused to permit the delivery of any more. *Held*, that the title to the undelivered portion had not passed because "the price is made to depend upon the weight."

In Rugg v. Minett, 11 East. 210, a quantity of turpentine had been sold, part of which was to be put up in lots of a specified quantity, after which the balance was to be measured and paid for. Before this was entirely done it was consumed by fire. *Held*, that the title passed in those lots only which had been put up.

In Simmons v. Swift, 5 B. & C. 857, bark had been sold at a given price per ton. Part was weighed, paid for and taken away, but title to the balance was held not to have passed because not yet weighed.

In Logan v. Le Mesurier, 6 Moore, P. C. 116, a quantity of timber, containing about a given quantity, was sold at a given price per foot to be delivered at a given place and measured. The purchasers paid down the price at the rate agreed upon for the supposed quantity, and the surplus or deficiency was to be provided for when measured. The timber did not arrive at the prescribed place at the time agreed upon, and a great part of it was then lost in a storm before measurement and delivery. *Held*, that title passed only to so much as was measured and received, and the purchasers could recover the excess paid on the price.

In the similar case of Gilmour v. Supple, 11 Moore, P. C. 551, the lumber had been delivered to the buyer's agent and was then lost in a storm. It was shown that before delivery it had been measured by a public officer and was not to be again measured by the seller. *Held*, that the title had passed.

In Tansley v. Turner, 2 Scott, 238, 2 Bing. N. C. 151, a quantity of timber had been sold at so much per cubic foot with privilege to convert on the land. Part was measured and removed the same day, and the seller's agent marked and measured the

pose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on their quantity or quality, the performance of this act shall be a condition precedent to the transfer of the property, even though the goods are ascertained and are in the state in which they ought to be accepted. This rule, modified with respect of notice and intention, has been incorporated in the English Sale of Goods Act as follows: "Unless a different intention appears . . . where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof."[1]

§ 516. —— **In the United States** the courts generally have not gone to the extent of declaring the act to be absolutely a condition precedent, as in Lord Blackburn's rule, and the position assumed by the majority may perhaps be stated thus: Where, under a fair construction of the contract, some act other than separation from a larger mass remains to be done in order to determine the amount to be paid, where this depends upon the quantity or quality of the goods not yet delivered, as to count, weigh, measure or inspect them, the performance of this act, in the absence of anything showing a contrary intention, is presumptively a condition precedent to the passing of the title; and the title, therefore, in the absence of an intention to the contrary, will not pass until such act be done, although the goods are definitely ascertained, and are in all respects in the condition in which they ought to be accepted.[2]

remaining trees, putting down the figures but not computing the whole, and saying that he would make out a statement and send it to the buyer, which was not done. *Held*, that the title passed, as nothing remained to be done by the vendor. To same effect: Cooper v. Bill, 3 H. & C. 722.

[1] Sale of Goods Act, § 18, rule 3.

[2] In Byles v. Colier (1884), 54 Mich. 1, Cooley, C. J., says: "In Lingham v. Eggleston, 27 Mich. 324, it was decided that the question whether a sale is completed or only executory is usually one to be determined from the intent of the parties as gathered

§ 517. ——. Failure to perform such a condition precedent may be taken advantage of by either party, and it is immaterial whether the weighing, measuring or testing is imposed by the contract as an obligation or is reserved as a privilege.

from their contract, the situation of the thing sold, and the circumstances surrounding the sale; that where the goods sold are designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined, these being circumstances indicating intent, but not conclusive; but that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be accepted. This case has been referred to with approval in the subsequent cases of Hatch v. Fowler, 28 Mich. 205; Hahn v. Fredericks, 30 Mich. 223, 18 Am. R. 119; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants', etc. Bank, 35 Mich. 515; Scotten v. Sutter, 37 Mich. 526; Carpenter v. Graham, 42 Mich. 191; Brewer v. Salt Association, 47 Mich. 526. The cases elsewhere to the same effect are numerous, and many of them are collected in Mr. Bennett's note to section 319 of the third edition of Benjamin on Sales. And see Kelsea v. Haines, 41 N. H. 246; Southwestern Freight Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Shelton v. Franklin, 68 Ill. 333; Straus v. Minzesheimer, 78 Ill. 492; Crofoot v. Bennett, 2 N. Y. 258; Groat v. Gile, 51 N. Y. 431; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. R. 42; Dennis v. Alexander, 3 Pa. St. 50; Galloway v. Week, 54 Wis. 604; Caywood v. Timmons, 31 Kan. 394. That the cases referred to settle the general principle, at least for this State, is beyond question or cavil. Presumptively the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to the contrary."

The case of Lingham v. Eggleston (1873), 27 Mich. 324, which was followed in Byles v. Colier, *supra*, was one in which the defendant contracted to purchase certain lots of lumber, at a certain price per thousand for common and a less price for culls. The plaintiff and defendant went together to the yard where the lumber was piled and identified that which was to be included in the sale. But the relative amounts of the two grades had not been determined, and the contract provided no method for doing it. Before delivery the lumber was destroyed by a forest fire, and

§ 518. —— Presumption not conclusive.— This presumption, however, that the title does not pass until the act of weighing, measuring, testing and the like has been performed, is not conclusive; and it readily gives way before evidence of the contrary intention of the parties.[1]

the plaintiff, claiming that the title had passed, sued for the purchase price. But the court held that the title evidently had not passed, since something of high importance remained to be done by the vendor to ascertain the price to be paid — something, indeed, as to which there might well be, and in fact were, great differences of opinion, viz., the determination of the precise amount of each grade of lumber.

Very like this case is Miller v. Seaman (1896), 176 Pa. St. 291, 35 Atl. R. 134. Here there was an agreement made by the seller, who resided at Elmira, N. Y., with the buyer, who lived at Williamsport, Pa., for the sale of all the lumber in eleven piles on the land of a third person at Du Boistown, Pa., at a certain price per thousand feet "shipping count, f. o. b. cars at Williamsport, to be loaded, inspected and measured, as ordered by the purchasers, by" a person named, to be paid for within thirty days; and all lumber which remained on the yard at a certain date was then to be inspected and measured by another person named, and paid for at a different rate. After part had been ordered, inspected and paid for as agreed, but before the date named when all should be inspected, the lumber remaining in the yard was swept away by a flood and lost. The action was for the price of the estimated quantity so lost. It was held, however, that the title to this lumber was still in the seller, and that title passed to the buyer only as fast as the lumber was ordered, inspected, measured and delivered f. o. b. at Williamsport.

[1] In Straus v. Minzesheimer (1875), 78 Ill. 492, it is said: "There are numerous most respectable authorities which hold that a contract for the sale of specific goods, or of goods identified, where something remains to be done to the property, will pass the title to the property before the act is done, if such appears by the contract to have been the intention of the parties. In consonance with this class of cases this court held, in Graff v. Fitch, 58 Ill. 373, and in Shelton v. Franklin, 68 Ill. 333, that the title to personal property would pass by a contract of sale, where such was the intention of the parties, although measuring or weighing was to be had at a subsequent time, in order to ascertain the amount to be paid."

In Riddle v. Varnum (1838), 20 Pick. (Mass.) 280, the court say: "The general doctrine on this subject is undoubtedly that when some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to the consummation of the contract; and until it is performed the property does not pass to

§ 519. —— Broader rule in some States.— A still more liberal rule than that stated in the preceding section may well deserve attention. For where the goods are definitely ascertained, and are of the kind that the seller is bound to receive, and are in the condition in which he is to accept them, so that nothing remains but to ascertain the price, no satisfactory reason is apparent why the title should not pass at once, unless a contrary intention appears; and several able courts have so declared.[1]

the vendee. But in the case of sales where the property to be sold is in a state ready for delivery, and the payment of money, or giving security therefor, is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected, and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a case presents a question of the intention of the parties to the contract. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the rate agreed upon." See also Leonard v. Davis, 1 Black (U. S.), 476.

In Kelsea v. Haines, 41 N. H. 246, the court also say: "So where the process of ascertaining the quantity has been substantially performed, the title passes, although a trifling act remains to be done in order to complete the enumeration, especially if the vendee is in possession, and the remaining act is to be done by him. Hill. on Sales, 148; Tansley v. Turner, 2 Scott, 238; Tyler v. Strang, 21 Barb. (N. Y.) 198; Oliphant v. Baker, 5 Den. (N. Y.) 379; Shepherd v. Pressey, 32 N. H. 50; Gilman v. Hill, 36 N. H. 311."

[1] In Cleveland v. Williams (1867), 29 Tex. 204, 94 Am. Dec. 274, it is said: "It is certainly correct, as laid down in the books, that when anything remains to be done by the seller, such as counting, weighing or measuring, the title does not pass when either of these operations is necessary in order to separate the goods from a larger mass of which they form a part; but when the entire mass is sold and must be measured simply with a view to the ascertainment of its price for the purpose of a settlement, the better opinion, on principle and authority, is that the title passes. By keeping the distinction between a specific and an indefinite commodity in view, it is believed that most of the cases upon this subject can be explained and their apparent conflict reconciled. McComber v. Parker, 13 Pick. (Mass.) 182; Cunningham v. Ashbrook, 20 Mo. 560; Scott v. Wells, 6 Watts & S. (Pa.) 368, 40 Am. Dec. 568; Riddle v. Varnum, 20 Pick. (Mass.) 283; Crofoot v. Bennett, 2 N. Y. 260." In the case last named (Crofoot v. Bennett) it is said that "if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them in order to ascertain what would be the price of the

§ 520. Nor where goods are yet to be measured, weighed or tested with a view to identification.— In many of the cases in which Lord Blackburn's rule has been apparently approved, the question was not confined to the necessity of weighing, measuring or testing for the sole purpose of ascertaining the price; but the additional element of identification or separation from a larger mass was involved.[1] This distinction is of importance, though it is frequently ignored. If the object sought to be accomplished by the weighing, measuring, testing and the like is the identification of the goods to which the contract is to apply — as where the sale is to be of all of the timber of a certain size, all of the hogs of a certain weight, all of the wheat of a certain grade, and the like,— there is then presented a case of the class to be considered in the following chapter where the goods are not specific, but it is not of the class now under consideration. In cases of that kind the title obviously

whole at a rate agreed upon between the parties, the title will pass." Speaking of this case in Burrows v. Whitaker (1877), 71 N. Y. 291, 27 Am. R. 42, it is said: "It was also laid down that the distinction in all these cases does not depend so much upon what is done as upon the object to be effected. If it be specification, the property is not changed; if merely to ascertain the total value at designated rates, the change of title is effected." To like effect: Groat v. Gile, 51 N. Y. 431; Kimberley v. Patchin, 19 N. Y. 330; Bradley v. Wheeler, 44 N. Y. 495; Sanger v. Waterbury, 116 N. Y. 371, 22 N. E. R. 404; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. R. 248, 9 Am. St. R. 199; Lassing v. James, 107 Cal. 348, 40 Pac. R. 534; Boaz v. Schneider, 69 Tex. 128, 6 S. W. R. 402; Ober v. Carson, 62 Mo. 209. See *ante*, § 496 and cases cited; also Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. R. 214, 9 Am. St. R. 443, 1 L. R. A. 767.

[1] See, for example, Rosenthal v. Kahn (1890), 19 Oreg. 571, 24 Pac. R. 989; Davis v. Hill (1826), 3 N. H. 382; Outwater v. Dodge (1827), 7 Cow. 85; Devane v. Fennell (1841), 2 Ired. (N. C.) 36; Warren v. Buckminster (1852), 24 N. H. 336; Joyce v. Adams (1853), 8 N. Y. 291; Gilman v. Hill (1858), 36 N. H. 311; Robertson v. Strickland (1868), 28 Up. Can. Q. B. 221; Abat v. Atkinson (1869), 21 La. Ann. 414; First Nat. Bank v. Crowley (1872), 24 Mich. 492; Hahn v. Fredericks (1874), 30 Mich. 223, 18 Am. R. 119; Pike v. Vaughn (1876), 39 Wis. 499; Galloway v. Week (1882), 54 Wis. 604, 12 N. W. R. 10; Hays v. Pittsburg Co. (1888), 33 Fed. R. 552; Blackwood v. Cutting Packing Co. (1888), 76 Cal. 212, 18 Pac. R. 248, 9 Am. St. R. 199.

The following cases seem to adopt the English rule: The Elgee Cotton Cases (1874), 22 Wall. 180; Kein v. Tupper (1873), 52 N. Y. 550; Jones v. Pearce (1869), 25 Ark. 545.

cannot pass until the goods have been identified; but the question with which the present discussion began was, by its terms, whether title to specific, ascertained goods, not actually delivered, can pass until the price has been determined by the process of weighing, measuring or testing them. Here the object to be effected is not to distinguish the goods, for that, *ex hypothesi*, has been already done; but merely to ascertain their total value at designated rates.

§ **521.** ——. As has been stated, however, the two questions are often presented together, and the courts, in dealing with them, have applied Lord Blackburn's rule apparently as applicable to both. If something like weighing, measuring, testing and the like is to be done to identify the goods, that is an additional reason why the title does not at present pass, and would of course suffice if the other element of unsettled price were not involved.[1]

[1] Thus see Joyce v. Adams (1853), 8 N. Y. 291. Here plaintiffs bought of defendants two hundred and fifty-nine bales of cotton. Defendants had it in store in three parcels, one of one hundred bales, and one of sixty-four bales, stored at 296 Water street, and one of ninety-five bales stored elsewhere. The contract called for one hundred and sixty-four bales described as Charleston and sixty-four bales described as Mobile, to be paid for at the rate of thirteen and a half cents per pound, delivered within thirty days. The cotton stored at 296 Water street was destroyed by fire before delivery, and the plaintiffs brought action for the return of $5 per bale which they had advanced upon it. The court held that the title had not passed to the purchaser, and in the course of the opinion said: "In this case the subject-matter of the contract of sale, so far as it respected the number of bales and brands, was identified by it, but it did not call for the cotton stored at 296 Water street. Any other bales of cotton of the description specified would as well have answered the obligation of the sellers with the buyers. And besides, the cotton was to be paid for at thirteen and a half cents per pound, and to be delivered by the sellers within or at the expiration of thirty days thereafter, when the balance of the price was to be paid. The weight had not been ascertained by the contract, and no mode was specified in which it was to be ascertained; but it was necessary that it should be before the price could be computed. . . . The contract, from its nature and terms, was clearly and wholly executory on the part of the sellers, leaving the title of the cotton in them, to be thereafter passed to the buyers, on the performance of certain things by them; and until these were performed the risk

§ 522. Nor where goods are yet to be measured, weighed or tested to ascertain whether they are the kind or quality of goods the buyer is to accept.— There are still other cases, not often clearly distinguished, in which the weighing, measuring, testing and the like is to be done neither to ascertain the price nor the identity of the goods alone, but also to determine whether the particular goods in question, apparently of the kind agreed upon, are really of the kind or quality which the buyer is bound to accept. Thus, though the parties are contracting with reference to specific chattels, for example a number of bales of cotton, but, by the contract, the cotton is thereafter to be sampled by both parties to ascertain if it conforms to a sample which was the basis of the dealing, the title will not pass until that act is done; and the fact that the cotton is yet to be weighed in order to ascertain the price furnishes simply another reason leading to the same result.[1]

§ 523. ——. The same result would ensue where a crop of grain is yet to be harvested to prepare it for delivery; to be brought to a certain place to be weighed to ascertain the

of it remained with them." In Smart v. Batchelder (1876), 57 N. H. 140, the defendant contracted to sell to one Waldron all the merchantable square-edged boards at his mill, at a fixed price per thousand. The quantity and quality were not ascertained. They were to be delivered at a certain place to be surveyed. Before anything was done with them they were attached by creditors of Waldron. The court, by Ladd, J., said: "I think the property in the boards had not passed to Waldron at the time of the attachment. It was only the merchantable boards in the pile that were to be taken by him. One act to be done, then, before delivery, was the selection and separation of the merchantable boards from the rest; they were to be surveyed. Then they were also to be transported by the seller to the mill of the Cocheco Company in Dover. Further, the price was so much per thousand, and the quantity had not been ascertained. This brings the case far within the authorities. When goods are sold by number, weight or measure, the sale is incomplete until the specified property has been separated and identified."

[1] Kein v. Tupper (1873), 52 N. Y. 550. Here the court said, per Church, C. J.: "Assuming that this was a sale of a quantity of specific cotton, which I think we may do, and which is the most favorable view for the plaintiffs (the sellers), yet, as the cotton was to be weighed by the vendors to ascertain the quantity, and sampled by both parties to ascertain the quality, no title would pass until these acts were done."

price; and to be "sacked in good merchantable sacks," in order to make it the kind of commodity which the buyer is bound to accept.[1]

[1] Hamilton v. Gordon (1892), 22 Oreg. 557, 30 Pac. R. 495. See also Outwater v. Dodge (1827), 7 Cow. (N. Y.) 85. Here the defendants contracted to buy a quantity of fish that the plaintiff had, at a fixed price per barrel, the defendants to pay for inspection. If they were delivered at a certain dock on Long Island, defendants would not require plaintiff to make up the wantage, as it was termed, on the inspection and repacking; otherwise he was to do so. Plaintiff elected to deliver them on the Long Island dock, and did so deliver them, but there was no one there to receive them. Before the inspector began his work one of the defendants came over to the dock and asked him to tell plaintiff that the fish were inferior and would not be accepted, but the inspector was not told to desist from the inspection, and he accordingly completed it. The court held that it was evident the parties intended the inspection to be a condition precedent to the passing of the title, for the quantity was altogether uncertain until then. More or less might be condemned. The very agreement that they should be inspected implies that if they were not of a quality which would pass inspection the defendants were not obliged to receive them. Pike v. Vaughn (1876), 39 Wis. 499. Here there was a contract for the sale of a quantity of logs which the vendor was to cut and deliver at a specified place. While the vendor should be engaged in getting out the logs the vendee was to let him have goods and provisions as he needed them, upon the credit of the logs. The logs were delivered, but they were not scaled, the contract being silent as to when, where or by whom the scaling should be done, in order to determine the price. The court held that the parties did not intend there should be a delivery, and the title did not pass until the logs were inspected and scaled. "We do not suppose," say the court, "that the plaintiff was bound to accept all the logs which McDonald might deposit at the point designated, if any were unfit for use." Gilman v. Hill (1858), 36 N. H. 311. Here the plaintiffs agreed to buy all the pelts that a certain butcher should take off between July and October, at fifty cents each, and they might take them from time to time as they should become dry. Eighty pelts were counted over by the parties and laid aside. Subsequently thirteen more were taken off, placed upon the eighty, and the whole lot was levied upon as the property of the butcher. The court held that the eighty were clearly the property of the plaintiffs, but that the thirteen had not been actually accepted, as the purchasers had not exercised their option to receive or reject the goods. Devane v. Fennell (1841), 2 Ired. (N. C.) 36. The plaintiff here agreed to sell a certain raft of timber, which was to be put in the purchaser's timber pen, inspected and measured. It was delivered in accordance with the agreement, but before inspection was taken away. It was held that the title was still in the plaintiff, since the parties could not have intended

§ 524. By whom weighing, etc., to be done.— The act of weighing, counting and the like is usually to be performed by the seller, and the English decisions and statute have confined the rule to such cases;[1] but this is not generally deemed material, and the contract may provide, expressly or impliedly, that it shall be done by the buyer. In such a case the title presumptively will not pass until he has performed it, especially where the sale is to be for cash;[2] but this presumption, like the other, yields to the contrary intention of the parties.[3]

an absolute delivery while the timber had still to be inspected and measured.

[1] See the English statute before referred to. See also the discussion in Turley v. Bates (1863), 2 H. & C. 200, 33 L. Jour. (Ex.) 43. But that the intention controls, see Martineau v. Kitching (1872), L. R. 7 Q. B. 436.

[2] In Hoffman v. Culver (1880), 7 Ill.

[3] The case of Cunningham v. Ashbrook (1855), 20 Mo. 553, is strikingly like that of Ward v. Shaw, *supra*. Here plaintiff had sold his hogs to defendant at $4.15 per cwt., net weight, to be delivered at the slaughter-house of defendants, and to be killed and weighed by the buyers. After killing, but before weighing, they were destroyed by accidental fire. Plaintiff sued to recover the price, and at the trial it was held that he could not recover, as the title was not to pass before the price had been ascertained by weighing. This was reversed, the supreme court holding that it was a question of intention for the jury. There is discussion in the case of the general principles and an opinion expressed that the general rule applies only where identification is necessary, but the effect of the decision is found in the closing lines of the opinion: "We repeat what we have before said, it is a question for the jury. If the delivery were for the purpose of passing the property it had that effect, although the price was to be afterwards ascertained and paid according to the net weight, and there is no rule of law that, under such circumstances, the presumption arising from the delivery is met and repelled, and that other evidence becomes necessary to make out a *prima facie* case of present sale. The seller has a right, notwithstanding the bargain, to retain his property till he is paid, unless he agrees to allow the purchaser a credit (the bargain for an immediate transfer of property implying a present payment of the price), and hence, when there is no understanding as to the time of payment, other than what is implied in the postponement of it, until the quantity of the thing sold is ascertained in the manner indicated by the contract, this circumstance is certainly entitled to consideration with the jury in determining the character of the delivery, which, if intended to pass the thing in property, deprives the seller of his security upon it for the price, at the same time that it throws upon the buyer the future risk."

§ 525. How where the whole body of goods is delivered to the buyer.— Where, however, before weighing, counting or measuring, the whole body of the goods is delivered to the

App. 450, it appeared that plaintiffs were the owners of a carload of wheat standing on the track at Chicago. They entered into a contract to sell the wheat for cash to one Martin, who was to ascertain the number of bushels and pay a fixed price per bushel as soon as weighed out. Plaintiffs gave to Martin an order on the railroad company to deliver to him the car. Without presenting this order, or obtaining delivery of the car with the assent of the railroad company, Martin weighed out two wagon loads of wheat, transferred it to another car and there mixed it with other grain of his own, without plaintiffs' consent and without paying for it. It was there seized by creditors of Martin before the remainder of the wheat had been weighed out. *Held*, that plaintiffs' title had not been divested. Said McAllister, P. J.: "We take it to be clear law that when in a contract of sale of the contents of a car or bin, it being grain, but the quantity of which is unknown, and the sale is for cash, to be paid as soon as the grain can be weighed, which weighing is necessary in order to ascertain the price to be paid by the buyer, and there is no provision as to delivery, the property in that case, the grain, does not pass to the buyer by the bargain, even though the weighing is to be done by him and there was nothing to be done by the seller to ascertain the identity or the quantity or quality of the commodity. The payment of the price is a condition preliminary to the property passing to the buyer; and that could not be done before the quantity was ascertained by weighing." And also: "It is the settled law of England, and it ought to be the law here, that, where goods are in the possession of a third party as bailee or agent of the vendors, if the vendors make a contract of sale of them while so situated for cash, and the vendee has not paid for them, the giving by the vendor to the vendee of a delivery order addressed to such bailee or agent, directing him to deliver the goods to the vendee, but which is not presented to such bailee or agent and assented to by him, will have no effect in changing the property in such goods from the vendor to the vendee. The property and possession will be regarded as still remaining in the vendor, for the reason that until such bailee or agent attorn to the vendee to whom such order is given, he will be regarded as remaining the agent of the vendor, and his possession as that of the vendor. Bentall v. Burn, 3 B. & C. 423; Farina v. Home, 16 Mees. & W. 119; McEwan v. Smith, 2 H. of L. Cas. 309; Benj. on Sales (2d ed.), 132, 133."

In Ward v. Shaw (1831), 7 Wend. (N. Y.) 404, the contract was for the sale of two oxen which the vendee was to kill, prepare for market, then weigh and pay for at a given price per cwt. dressed. The vendee took the cattle for this purpose, but on the same day they were levied upon by his creditors. *Held*, that the title had not passed to him. Said Savage, C. J., after referring to the English cases: "The rule laid down in Hanson v. Meyer, 6 East, 614, is that the prop-

buyer, and the sale is not for cash upon delivery, this is very strong evidence that the property is to vest in him at once, leaving the price to be afterwards determined,[1] but it is obviously very weak evidence where the sale is for cash upon delivery.[2]

erty does not pass when anything remains to be done by the *vendor;* when the thing to be done is necessary to ascertain the price, and the sale is for cash, it can make no difference whether that thing is to be done by *vendor* or *vendee.* The property is not to pass till payment; the price must precede the payment, and until the price is ascertained, payment cannot be made or waived unless by express terms; the acts of the vendor cannot, before that time, be construed into a waiver."

In Andrew v. Dieterich (1835), 14 Wend. (N. Y.) 31, plaintiff had sold carpets to one Simmons to furnish a house to be paid for in cash. Plaintiff sent the carpets to the house in the roll so that the necessary amounts might be ascertained and cut off, when the balance was to be returned and the amount used was to be ascertained and paid for. Simmons cut off and laid what was necessary to cover his floors, but, before paying for it, pledged it to defendant for a loan and absconded. *Held,* that plaintiff's title had not been divested, Ward v. Shaw, *supra,* being relied upon. See also Ballantyne v. Appleton (1890), 82 Me. 570, 20 Atl. R. 235, and Pinkham v. Appleton (1890), 82 Me. 574, 20 Atl. R. 237, cited *post,* under subd. III of this chapter.

[1] In Macomber v. Parker (1832), 13 Pick. (Mass.) 175, it is said: "The general principle is, that where any operation of weight, measurement, counting, or the like, remains to be performed in order to ascertain the price, the quantity, or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed. Brown on Sales, 44. But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to price. The sale would be complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point which militates against this position."

In Sedgwick v. Cottingham (1880), 54 Iowa, 512, 6 N. W. R. 738, there was a sale of a carload of wheat which the plaintiff was to ship to a certain point, where it was to be taken from the car by the defendant, hauled to his mill, and paid for upon being weighed by him. The plaintiff shipped the car as agreed, but before weighing the wheat was accidentally burned. *Held,* that the title had passed. Said the court: "The weighing is not a pivotal matter. It was to be done by the defendant after he had received it into his actual custody, and after it had been delivered at the place fixed by the contract. A careful consid-

[2] § 538 et seq.

§ 526. ——. In a case[1] of the former kind, where the contract was for the sale of lumber which had been placed under the charge of the purchaser's agent, the court said: "The whole property being identified and sold at a fixed price per

eration of the third finding (of the facts as above stated) will demonstrate, we think, that the weighing has reference only to the time of payment, and whether there had been a delivery or not is in no manner controlled or affected thereby."

In Scott v. Wells (1843), 6 W. & S. (Pa.) 357, 40 Am. Dec. 568, there had been a contract for the sale of a raft of timber at a given rate per thousand feet, and the raft had been delivered to the purchaser, though the number of feet had not been ascertained. *Held*, that the title had passed. Said Gibson, C. J.: "The delivery was unconditional, pursuant to the contract, and complete; why, then, did it not pass the property and put it at the purchaser's risk? Because, say the purchaser's counsel, the number of feet contained, or the sum total of the price, was not settled by the contract, and the consequence attempted is that the sale was imperfect in its members. Had there been no delivery, or a conditional one, the purchaser would not, perhaps, have been bound till the number of feet and entire price had been ascertained; but the parties evinced, by taking the last step, that nothing remained to be done in order to perfect the contract."

In Haxall v. Willis (1859), 15 Gratt. (Va.) 434, a crop of wheat not yet ready for delivery was contracted to be sold by sample, the seller to deliver it to the buyer, at a certain station, from which it was to be taken to Richmond at the seller's expense, and at Richmond it was to be taken by the purchaser at his own expense to his own mill and there to be weighed and tested by the sample, and, when thus weighed and tested, to be paid for. The wheat reached Richmond, and most of it had been taken to the mill by the purchaser, but a part was consumed by fire while in the station at Richmond before it could be removed. *Held*, that the title to all had passed to the purchaser, who must therefore stand the loss. The cases are quite fully reviewed, and Daniel, J., says: "There is, I think, a decided preponderance of authority in favor of the proposition that where the subject-matter of the contract has not only been completely ascertained and identified, but actually delivered, the mere fact that the weighing, counting or measuring is yet to be done by the buyer, in order simply to ascertain the aggregate sum of money which he is to pay as the price, does not of itself show such a defect in the transfer of the title as will prevent the risk of loss from being cast on the buyer. Selwyn's Nisi Prius, 1054; 2 Kent's Com. 675, 676; Sumner v. Hamlet, 12 Pick. (Mass.) 76; Macomber v. Parker, 13 Pick. 176; Riddle v. Varnum, 20 Pick. 280; Morgan v. Perkins, 1 Jones' (N. C.) L. 171; Tyler v. Strang,

[1] Adams Mining Co. v. Senter, 26 Mich. 73. To same effect, Colwell v. Keystone Iron Co., 36 Mich. 51.

foot, the process of ascertaining the amount was not essential to passing the title, as it might have been if less than the whole amount delivered was to be sold and separated by measurement. In that case the measurement might be necessary to fix the identity of the property sold. But where all is sold, no such process is needed to pass title. The ascertainment of the price was a mere mathematical computation, involving no further action to bring the minds of the parties together."

§ 527. ——. And in another case[1] of the like kind, the court lay down the rule as follows: "Where anything remains to be done between the seller and purchaser before the

21 Barb. (N. Y.) 198; Crofoot v. Bennett, 2 Comst. (N. Y.) 258; Page v. Carpenter, 10 N. H. 77; Cunningham v. Ashbrook, 20 Mo. 555." The court likens the case to that of Cunningham v. Ashbrook, *supra*, where an entire drove of hogs had been sold at so much per hundred weight, net weight, to be delivered at the slaughter-house of the buyer, who was to kill and weigh them. The hogs were delivered and slaughtered, and the seller was notified that he might call the next day at the packing-house of the buyer, see the hogs weighed, and get his pay. That night the slaughter-house was burned and the hogs destroyed. *Held*, that the title had passed and the seller could recover the price.

In Burrows v. Whitaker (1877), 71 N. Y. 291, 27 Am. R. 42, it appeared that defendant agreed to buy of plaintiff all the lumber which he should deliver at a specified place on the Delaware river, before a certain time; and prices were agreed on for the good and for the culled. Defendant was to cull and pile, and the lumber was to be counted on the bank or estimated in the raft at that place. The delivery was commenced, and a portion was culled and piled, but before it could be counted or estimated it was carried away by a freshet. In an action to recover the contract price for the amount so delivered, *held*, that the evidence sustained a finding of delivery and acceptance, and that delivery of the whole amount contracted for was not necessary to pass title to that delivered.

[1] Ober v. Carson (1876), 62 Mo. 209, citing Cunningham v. Ashbrook, 20 Mo. 553; Glasgow v. Nicholson, 25 Mo. 29; Bass v. Walsh, 39 Mo. 192; Williams v. Gray, 39 Mo. 201.

The rule that title to goods does not pass so long as anything remains to be done to ascertain the quantity and price of the article sold, does not apply where there is a delivery with the intention of passing title. Chamblee v. McKenzie (1876), 31 Ark. 155; O'Keefe v. Kellogg (1854), 15 Ill. 347; Dennis v. Alexander (1846), 3 Pa. St. 50; Seckel v. Scott (1872), 66 Ill. 106; Foster v. Magill (1886), 119 Ill. 75, 8 N. E. R. 771; Crofoot v. Bennett (1849), 2 N. Y. 258; Odell v. Railroad Co. (1871), 109 Mass. 50; Cushman v.

goods are to be delivered, as separating the specific quantity sold from a larger mass, or identifying them when they are mixed with others, a present right of property does not attach in the purchaser. But when a mere operation of weight, measurement, counting, or the like, remains to be performed after the goods are actually delivered, and it is shown that it was the intention of the parties to complete the sale by delivery, such weighing, measuring or counting afterwards will not be regarded as a part of the contract of sale, but will be considered as referring to adjustment on a final settlement. The question of transfer to, and vesting title in, the purchaser always involves an inquiry into the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts show an intention on the part of the seller to relinquish all further claim as owner, and on the part of the buyer to assume such control with all liabilities."

Holyoke (1852), 34 Me. 289; Upson v. Holmes (1883), 51 Conn. 500; Sedgwick v. Cottingham (1880), 54 Iowa, 512, 6 N. W. R. 738; Boswell v. Green (1856), 25 N. J. L. 390; King v. Jarman (1879), 35 Ark. 190, 37 Am. R. 11; Morrow v. Reed (1872), 30 Wis. 81.

Where a quantity of hemlock bark had been sold, delivered and accepted, and the vendee had assumed control of it as owner, it was held that the title vested in him at once, although the bark had not been measured, and that a loss of it by fire fell upon him. Baldwin v. Doubleday (1886), 59 Vt. 7, 8 Atl. R. 576.

So where wood had been the subject of a contract of sale, the wood to be carried by the vendee to a certain place and there piled, measured and paid for, and the wood after delivery to the vendee was lost before measurement, it was held that the title had passed. Gill v. Benjamin, 64 Wis. 362, 54 Am. R. 619, 25 N. W. R. 445. Said the court: "Was such piling and measuring a condition precedent to the vesting of the title thereof in the defendant? Where the manifest intention of the parties is to transfer the title the sale may be complete, notwithstanding the property is yet to be measured and the amount of the price yet to be ascertained. Sewell v. Eaton, 6 Wis. 490, 70 Am. Dec. 471; McConnell v. Hughes, 29 Wis. 537; Morrow v. Campbell, 30 Wis. 90; Fletcher v. Ingram, 46 Wis. 191. So held where by the agreement the vendee was to have the title to saw-logs as soon as the vendor deposited them in a certain place. Morrow v. Reed, 30 Wis. 81. These principles are fully recognized and sanctioned in Pike v. Vaughn, 39 Wis. 505, relied upon by counsel for the defendant."

§ 528. —— **What delivery sufficient in such cases.**— The delivery which will suffice to satisfy the preceding rule need not, in all cases, be an actual, physical delivery into the manual possession of the purchaser. There may here, as in other cases, be a constructive delivery, as where goods which are so ponderous or bulky as not to be capable of manual delivery are put under the actual control of the buyer, or where there is delivered to him the key of the warehouse in which they are contained. Here, again, the intention of the parties governs, and if, from all the circumstances, it is evident that they treated the goods as delivered, the title may pass within the rule of the previous section, even though something is yet to be done to ascertain the quantity or quality which is to determine the amount to be paid.[1]

§ 529. —— **How when the contemplated means of ascertaining quantity, etc., fails.**— Where the whole body of the goods is thus delivered to the purchaser, with the intention of

[1] Morrow v. Reed (1872), 30 Wis. 81. In King v. Jarman (1879), 35 Ark. 190, 37 Am. R. 11, cotton contracted to be sold was lying in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. Said the court: "Where the minds of the parties have assented to the present purchase and sale of a specific chattel, which may be clearly identified and separated from other property, and the sale be dependent on no conditions or contingencies, *and such possession be given as the nature of the subject and the situation of the parties with regard thereto will permit of*, and the vendor has done all that is required of him with respect to the property, the title will pass. And this will be so notwithstanding something may be still necessary on the part of the vendee to ascertain the exact price. That, when intrusted to the vendee, is a matter of confidence not affecting the sale."

So in Bethel St. Mill Co. v. Brown (1869), 57 Me. 9, it is said: "The law regulating the delivery of property upon a sale accommodates itself to the necessities of the business and the nature of the property, making a symbolical delivery sufficient where nothing but a constructive possession can ordinarily be had, and by no means overlooking the possibility that the merchandise sold may remain in possession of the seller for certain specific purposes, among which are transportation and delivery at another place, where the property in it has actually passed from him and vested in the purchaser, without affecting the validity of the sale. Boynton v. Veazie, 24 Me. 286; Terry v. Wheeler, 25 N. Y. 520."

completing the sale, or the title is otherwise transferred, and the quantity, etc., is to be subsequently ascertained by some particular method or at some particular place, the impossibility afterwards of doing so by the method or at the place agreed upon will not defeat the sale, but the quantity, etc., may be ascertained in some other way.[1]

[1] Upson v. Holmes (1883), 51 Conn. 500. In this case the defendants purchased of the plaintiff all the wood standing upon a certain lot, at a certain price per cord, to be cut and hauled by the defendants and measured in their yard, and paid for after measurement. After all had been cut and a part had been hauled, a large quantity remaining on the lot was burned. *Held*, (1) that there had been a delivery to the defendants; and (2) that plaintiff could recover the value of the wood burned on any proper proof of its quantity.

So in Sedgwick v. Cottingham (1880), 54 Iowa, 512, 6 N. W. R. 738, wheat delivered to the purchaser to be afterwards weighed by him was accidentally destroyed by fire before weighing. *Held*, that the title had passed and the seller could recover according to the weight as shown by other evidence.

So in Cushman v. Holyoke (1852), 34 Me. 289, logs, which had been sold and delivered to be scaled at a subsequent time and particular place, were lost before being so scaled. *Held*, that the quantity could be shown by other means.

Other illustrations are found in Haxall v. Willis, 15 Gratt. (Va.) 434; Cunningham v. Ashbrook, 20 Mo. 555; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. R. 42; Gill v. Benjamin (1885), 64 Wis. 362, 54 Am. R. 619; Baldwin v. Doubleday, 59 Vt. 7, 8 Atl. R. 576.

In Gill v. Benjamin, *supra*, Gill agreed to sell to Benjamin one thousand cords of wood, "to be delivered from Gill's pier (in Michigan) over the rail of the vessel . . . and to be delivered from time to time to Benjamin's vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on Benjamin's dock in Milwaukee." One cargo of the wood was thus delivered and was lost with the vessel. *Held*, that the contract as to such cargo became an executed sale and the title vested at once in Benjamin, and the piling and measurement having become impossible, either by Benjamin's fault or the act of God, Benjamin was liable for the cargo.

In Martineau v. Kitching (1872), L. R. 7 Q. B. 436, the goods were destroyed by accidental fire before they had been weighed, and it was urged that this relieved the buyer, but Blackburn, J., replied: "I answer to that, in the first place, that the point is concluded by the authority of Alexander v. Gardner, 1 Bing. N. C. 671; Turley v. Bates, 2 H. & C. 200, and the recent case of Castle v. Playford, L. R. 7 Ex. 98 — which all go to show that where the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can."

§ 530. ——. Where, however, the goods have not been delivered, and the agreed method of determining the quantity, etc., fails, and the parties cannot agree upon another, the sale itself fails and the title does not pass.[1]

§ 531. **Effect of part performance.**— Here, as in the cases mentioned in the preceding subdivision,[2] if the weighing, measuring or testing is necessary at all, the fact that this act has been partly performed can usually be of no aid in passing the title unless the performance of the residue is waived. Where the contract is entire, the vendee may insist upon full performance, and unless he waives it the seller cannot recover by showing that he has done a part only of that which he was to do.[3]

§ 532. **Effect of earnest or part payment.**— For reasons similar to those likewise mentioned in the preceding subdivision,[4] the payment of earnest does not aid the passing of the title. It merely confirms the contract; but the question whether, under that contract, the title passes, remains to be determined as before.[5]

[1] Thus, in Nesbit v. Burry (1855), 25 Pa. St. 208, the parties had agreed upon the sale of a pair of oxen at so much a pound, live weight, the cattle to be thereafter weighed at a certain place on certain scales. The buyer at the time paid $10 as earnest. The cattle were afterwards taken to the place agreed upon, but it was then learned that the scales specified were out of repair and could not be used. The buyer was willing to have them weighed in some other place, and offered to pay the balance of the price as so determined; but the seller refused and took the oxen home. The buyer then brought replevin for them, but it was held that the title had not passed. The court said: "The weighing, being necessary to a perfect sale where there is no delivery, is not dispensed with by an unsuccessful attempt to weigh, or by a refusal to try a better mode of doing it. These matters left the parties as they stood before, and the title remained in the vendor. Nor does earnest or part payment aid in vesting the title where the quantity is yet to be ascertained and there is no delivery. Under such circumstances the contract is essentially executory, and the part payment only shows a concluded and binding agreement."

[2] See *ante*, § 513.

[3] The Elgee Cotton Cases (1874), 89 U. S. (22 Wall.) 180; Kein v. Tupper (1873), 52 N. Y. 550, quoted from in § 522, *ante*.

[4] See *ante*, § 514.

[5] The Elgee Cotton Cases, *supra;*

III.

Where the Buyer is to do Something other than to Merely Pay the Price as a Condition Precedent to the Passing of the Title.

§ 533. What here included.—The third rule as stated by Mr. Benjamin is, as has been seen,[1] that "where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." This thing which the buyer is to do is usually, as has been already stated, to pay the price; and this aspect of the condition will be fully dealt with in the following subdivision.

But there may be other things than payment which the buyer is to do as a condition precedent; and what these may be will here be separately considered.

§ 534. Title does not pass till act is performed.—In a recent case in Maine there was a contract for the sale of a quantity of wood to be delivered and piled upon the buyer's premises, there to be inspected and surveyed by an agent of the buyer, and to be paid for at a certain rate "when said wood shall be delivered and surveyed as aforesaid." The wood was all delivered, but before it was all surveyed the buyer became insolvent, and the seller sought to reclaim the wood on the ground that the title had not passed. The court, quoting and applying the rule of Mr. Benjamin, held that so far as the wood had been surveyed and accepted by the buyer, the title had passed and the seller could not regain it,[2] but so far as that act had not been done the title did not pass.[3]

Nesbit v. Burry (1855), 25 Pa. St. 208; Jennings v. Flanagan (1837), 5 Dana (Ky.), 217, 30 Am. Dec. 683.

[1] *Ante*, § 505.

[2] Pinkham v. Appleton (1890), 82 Me. 574, 20 Atl. R. 237.

[3] Ballantyne v. Appleton (1890), 82 Me. 570, 20 Atl. R. 235.

§ 535. ——. The same principle has to some extent been applied[1] where oxen were sold and delivered to the vendee, to be slaughtered, prepared for market and weighed by him, and to be paid for in cash at so much per hundred weight when dressed;[2] and where a carload of wheat was delivered to the buyer, to be weighed by him and paid for in cash at a certain price per bushel when the number of bushels should be so determined;[3] and where a roll of carpet was sent to the buyer's house that he might measure and cut off what he needed to cover his room, and was to pay for it in cash when the amount was thus ascertained;[4] though these cases more appropriately belong among those cited in the following subdivision.

§ 536. **Unless a contrary intention appears.**— But this rule, like the others, yields to evidence of a contrary intention. Thus, as has been seen,[5] the title may pass, if that under all of the circumstances appears to have been the intention, although the buyer is yet to do some act in reference to the goods; as, for example, to weigh them that the amount of the price may be ascertained.[6]

IV.

Where Payment of Price is Condition Precedent to Passing of Title.

§ 537. **What here included.**— The question whether the payment of the price is a condition precedent to the passing of the title is one which presents several aspects, and involves the consideration of a variety of circumstances. It must, in the first place, be distinguished from the question whether the seller has the right to retain possession until payment — a matter not fully to be considered now, but dealt with hereafter under the head

[1] See *ante*, § 524.

[2] Ward v. Shaw (1831), 7 Wend. (N. Y.) 404.

[3] Hoffman v. Culver (1880), 7 Ill. App. 450.

[4] Andrew v. Dieterich (1835), 14 Wend. (N. Y.) 31.

[5] See *ante*, § 498.

[6] See Burke v. Shannon (Ky.), 43 S. W. R. 223; Kohl v. Lindley, 39 Ill. 195; Phillips v. Moor, 71 Me. 78.

of the vendor's lien. There it will be found that, though the title may have passed, the seller has in many cases the right to retain possession as a means of securing the payment of the price. The question here is different, and involves the matter, not of the transfer of possession, but of the passing of the title. Is the payment of the price a condition precedent to the passing of the title?

This question divides itself into two distinct parts: (1) In general, is the payment of the price, by implication, a condition precedent; and (2) May the parties, by express agreement, make it a condition precedent?

The former of these two subdivisions will be considered first, and after it the second.

1. *Payment of Price as Implied Condition Precedent to Passing of Title.*

§ 538. In general — Payment as condition precedent where sale impliedly for cash.— Where a contract for the present sale of goods has been made, and nothing is said as to the time of payment, the law presumes that no credit is to be given, and that the price is to be paid concurrently with the delivery of the goods,— or, as it is often phrased, that the sale is to be for cash. Under such circumstances, is the payment of the price to be deemed by implication a condition precedent to the transfer of the title?

To this question there may be given the general answer that where the parties are negotiating concerning specific goods, and all of the terms have been agreed upon, and nothing remains to be done except to deliver the goods and pay the price, the title, as has been seen,[1] will be deemed to pass at once, even without delivery or payment, unless a contrary intention appears. The right to possession, however, as has also been seen, does not necessarily pass, for the seller, who has not waived it, has the right to retain possession of the goods by virtue of his vendor's lien to secure the payment of the price.[2]

[1] See *ante*, § 483.

[2] See *ante*, § 495.

§ 539. ——. Notwithstanding this general answer, the specific question may still be pressed: Where the parties evidently contemplate that the transaction is to be closed at once — where no term of credit is agreed upon — no stipulation for further dealings had — where the seller clearly expects cash in hand, although there may have been no express agreement to that effect,— is there not in these facts such evidence of an intention that the title shall not pass until the price is paid as to make such payment a condition precedent, even within the general rule above referred to?

Before the answer to this question is given let another be put. Thus —

§ 540. **Payment of price as implied condition where sale is expressly for cash.**— Instead of remaining silent as to the time of payment, as above supposed, the parties may expressly stipulate that the sale is to be for "cash" or for "cash upon delivery." In such a case, also, is the payment of the price to be regarded as a condition precedent to the passing of the title?

The parties may, indeed, go further and expressly stipulate in terms that the title shall not pass until the price is paid; but the effectiveness of such a stipulation, unless it is waived, is so clear as to require no comment here. The difficult question is, whether a sale which, by implication or expressly, is to be for "cash" or "cash upon delivery," shall be deemed conditional.

§ 541. —— **Meaning of "cash sale."**— It will be evident, upon reflection, that the expressions "cash," "cash down," or "cash upon delivery," may be used in two different senses — one where the words indicate simply that the goods must be paid for before the buyer is to be entitled to *possession;* and the other, where they indicate an intention not to part with the *title* until the price is paid.[1] Whether they are to have the one

[1] Thus in Clark v. Greeley (1882), 62 N. H. 394, the court say: "A sale of chattels may be conditional. The payment of the price may be made a condition precedent to the transfer of the title, and in such a case the property will not pass although the goods are delivered. A sale for cash

meaning or the other is a question of intention, depending largely upon the situation of the parties, the character of the property and the circumstances of the case. If the contract is in writing, or the facts are not disputed, it is a question for the court;[1] if the facts are in dispute, the question is for the jury.[2]

§ 542. —— Title may pass though possession retained — Payment and delivery to be concurrent.— Where the words are given the first meaning, it must be true that the *title* passes at once upon the completion of the contract and by force of it, so as to cast the risk upon the buyer and entitle the seller to the price.[3] It is, of course, true that the buyer, even though he has the *title*, is not entitled to *possession* until he pays the price; for *payment* and *delivery*, in such a case, are presumed to be concurrent acts,[4] and until payment is made the seller may retain the goods by virtue of his vendor's lien. But the seller retains possession and not title.

is not necessarily a conditional sale. Scudder v. Bradbury, 106 Mass. 422. The phrases 'terms cash' and 'cash down' may or may not import that payment of the price is made a condition precedent to the transfer of the title, according to the intent of the parties. If by the use of these terms the parties understand merely that no credit is to be given, and that the seller will insist on his right to retain possession of the goods until the payment of the price, the sale is still so far completed and absolute that the property passes; but if it is understood that the goods are to remain the property of the seller until the price is paid, the sale is conditional and the title does not pass." To same effect: Towne v. Davis (1890), 66 N. H. 396, 22 Atl. R. 450.

[1] Davis v. Giddings, 30 Neb. 209, 46 N. W. R. 425.

[2] Collins v. Houston, 138 Pa. St. 481, 21 Atl. R. 234; Paul v. Reed, 52 N. H. 136; Clark v. Greeley, 62 N. H. 394; Towne v. Davis, 66 N. H. 396. 22 Atl. R. 450; Scudder v. Bradbury, 106 Mass. 422; Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. R. 49 (citing Hall v. Stevens, 40 Hun, 578; Hammett v. Linneman, 48 N. Y. 399).

[3] Clark v. Greeley, *supra;* Phillips v. Moor, 71 Me. 78; Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. R. 471; Hayden v. Demets, 53 N. Y. 426.

[4] In Southwestern Freight Co. v. Stanard (1869), 44 Mo. 71, 100 Am. Dec. 255, it is said: "Where no time is stipulated for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment; and if the payment be not immediately made, the contract becomes void. Outwater v. Dodge, 7 Cow. (N. Y.) 85; Woods v. Magee, 7

§ 543. —— Or title may not pass until payment.— Where the words are given the second meaning, it is clear that the title will not pass until the price is paid or the condition waived. Here, until payment or its tender, the seller retains not simply the possession, but the title also. It is unquestionable that this is the ordinary interpretation of the words, and that the title does not pass until the price is paid or payment waived, not only in those cases in which the parties expressly stipulate that the sale is to be for cash, but also in those in which, though there was no express stipulation, the parties evidently contemplated that the transfer of the title and the payment of the price were to be concurrent acts.[1]

Ohio (Pt. II), 128, 30 Am. Dec. 202; Leven v. Smith, 1 Denio (N. Y.), 571; Com. Dig., tit. Agreement, B. 3; Palmer v. Hand, 13 Johns. (N. Y.) 434; Harris v. Smith, 3 Serg. & R. (Pa.) 20; Bainbridge v. Caldwell, 4 Dana (Ky.), 213; Ferguson v. Clifford, 37 N. H. 86; Morris v. Rexford, 18 N. Y. 552; 2 Kent's Com. (11th ed.) 665." This statement, however, as will be observed, and as an examination of the cases cited will more clearly indicate, confuses the delivery of possession with the transfer of the title. A much more accurate statement is that found in Safford v. McDonough (1876), 120 Mass. 290, as follows: "It should be kept in mind that the question is not whether . . . the title in the property would have passed to the defendant so that it would be at his risk. In such a case the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price and could retain possession until its payment. Haskins v. Warren, 115 Mass. 514; Morse v. Sherman, 106 Mass. 430; Townsend v. Hargraves, 118 Mass. 325."

[1] It was laid down by the earlier writers that a sale for cash is a conditional sale. Thus, Kent says that "Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, *and if the payment be not immediately made, the contract becomes void.*" 2 Kent's Com. 496, where he cites Comyn's Digest, tit. Agreements, B. 3, and Bell on Sales, Edin. (1844), 20, 21.

In an early case, Copland v. Bosquet (1826), 4 Wash. C. C. 588, 6 Fed. Cas., p. 513, No. 3212, it was said that "if the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee. If credit be not given, the bargain is considered nothing more than a communication." Quoted and approved in Bergan v. Magnus (1896), 98 Ga. 514, 25 S. E. R. 570.

In Paul v. Reed (1872), 52 N. H. 136,

§ 544. ——. The subject, nevertheless, is one concerning which there seems to be much difference of opinion and considerable cloudiness of thought. It is often said that a sale for cash is a conditional one, and that the property will not

Williston's Cas. on Sales, 68, it appeared that Reed, who was keeping a boarding house, had arranged to sell out to one Moody, who was to buy Reed's hog, sugar and certain other supplies. On the day that the transfer was to be made Reed was to furnish the breakfast and Moody was to furnish the dinner, and the parties were respectively to change possession of the house. A price was agreed upon for the several articles which Moody was to buy, the hog was changed from one pen to another at Moody's request, the sugar was put in with his stock, and, the amount to be paid having been ascertained, he stood with his pocket-book in his hand looking over the list preparatory to immediate payment, when he was served with garnishment or trustee process by Paul, a creditor of Reed. Reed immediately demanded back the goods, saying: "We can call it no sale, and I can take my stuff." Moody said he had no objections to giving up the goods if he could safely do so; but he was advised not to do so. The understanding, as testified to by Moody, was, "I was to pay cash right in his fingers; I did not ask any time for him to wait." The question was whether the title had passed so that Moody owed Reed the price at the time of the service of the writ. The court below held that the title had passed and that the trustee was therefore liable; but the supreme court reversed it, holding that the transfer of title was conditioned upon immediate payment. Said the court: "The question then is whether the goods were delivered so as to vest the title in the trustee. The proof tends to show that the sale was for cash, and not on credit; so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated. 2 Kent's Com. 496, 497; Story on Con., sec. 796; Noy's Maxims, 87; Insurance Co. v. De Wolf, 2 Cow. 105. The case, then, stands before us as a contract of sale for cash on delivery; in such case the delivery and payment are to be concurrent acts; and therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer. The seller may, to be sure, waive the payment of the price, and agree to postpone it to a future day, and proceed to complete the delivery; in which case it would be absolute, and the title would vest in the buyer. But in order to have this effect it must appear that the goods were put into the buyer's possession with the intention of vesting the title in him. If, however, the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to per-

pass until the price is paid, when all that was really necessary or intended was evidently that the buyer could not have *possession* until he paid the price. There are, doubtless, on the other hand, cases in which the sale was really conditional —

form the contract as to entitle the seller to put an end to it and reclaim the goods. The evidence relied upon to prove the delivery to be absolute and intended to pass the title at all events is simply and solely the changing of the hog into another pen, and mixing the sugar with the sugar of the buyer. Without the mixing of the sugar, the case would be just the ordinary one of a delivery of the goods with the expectation that the buyer would at once pay the price; and we think that circumstance is not enough to show a purpose to make the delivery absolute, but rather a confident expectation that the buyer would do as he had agreed, and pay the price at once. . . . It is very clear that the intermingling of the sugar does not, as matter of law, make the delivery absolute; and I think, as matter of fact, it is not sufficient to prove an intention to pass the title absolutely. When the buyer declined to pay the price, the seller at once reclaimed the goods, and so notified the buyer, who did not object to giving up the sale if he could safely do so."

In Turner v. Moore (1886), 58 Vt. 455, plaintiff had bargained with defendant for a tombstone. Defendant claimed that the sale was to be for cash, and plaintiff testified that at the time of the contract nothing was said as to the time of payment and that she expected to pay cash on delivery. When the stone was completed, defendant took it on Saturday afternoon to the cemetery to place it in position, but, night coming on before it was erected, he left it there until the following Wednesday, when, having become concerned about the payment, he took the stone back to his shop. Plaintiff thereupon brought this action, declaring in trover and for the conversion of the stone. The court below permitted a recovery, but this judgment was reversed by the supreme court, where it was said: "If the contract was for the sale of the stone, and there was no agreement that time should be given the plaintiff in which to make payment, it was a cash sale, and no title would vest in the plaintiff until she paid or tendered the money. The court told the jury that if the stone was delivered to the plaintiff, the title vested in her, and she became the owner. We think they should have been told that, if they found it a cash sale, title would not vest until payment or tender of payment."

In Evansville, etc. R. Co. v. Erwin (1882), 84 Ind. 457, the parties expressly stipulated that the goods in question — a carload of wheat — should be delivered, weighed and paid for at a certain place and that payment should be made upon delivery, and the seller gave as his reason for insisting upon such payment that the vendee was a stranger to him. This was held to be a case where payment was a condition precedent to the passing of the title.

Palmer v. Hand (1816), 13 Johns. (N. Y.) 434, was a case where a raft

cases in which it is clear, from the surrounding circumstances or the express language of the parties, that the *title* was not to be transferred until the price was paid.

of lumber was sold with the evident intention that cash should be paid on delivery. The vendee resold it and absconded before the delivery was complete, and the vendor thereupon stopped delivery and asserted ownership as against the vendee of the absconding purchaser. The court used language which was somewhat self-contradictory, but the opinion evidently was that the title had not passed.

In Leven v. Smith (1845), 1 Denio (N. Y.), 571, the plaintiffs were vendors of boots and shoes which were delivered to the defendant in the expectation of immediate cash payment. Instead of tendering cash, the defendant offered a matured note of the plaintiffs as part payment, and cash for the balance, which was refused and replevin brought for the goods. Action sustained on the ground that after such delivery the defendant held the goods in trust for the plaintiffs until payment was made or waived.

Pinkham v. Appleton (1890), 82 Me. 574, 20 Atl. R. 237, following Mixer v. Cook (1850), 31 Me. 340, held that where a sale of personal property was to be for cash (in both these cases expressly so), the title would pass to the vendee before payment only when the payment as a condition precedent had been waived, and it was clear that mere delivery was not held to be such a waiver. So, also, in Stone v. Perry (1872), 60 Me. 48.

In Fishback v. Van Dusen (1885), 33 Minn. 111, 22 N. W. R. 244, a sale of wheat was made expressly for cash, and the wheat delivered without payment being made or demanded. Upon the vendor attempting to assert title, the court held that in such a sale title would not pass before payment, unless the condition had been waived, an *apparently* unrestricted and unconditional delivery being presumptive evidence of such waiver.

In Johnson-Brinkman Co. v. Central Bank (1893), 116 Mo. 558, 22 S. W. R. 813, 38 Am. St. R. 615, plaintiffs sold a number of cars of wheat for cash, and payment was made by private check of the vendee. The check, after being duly deposited and sent through the clearing-house, was presented to the defendant bank, on which it was drawn, and payment refused, the wheat having meantime been transferred to a third party and the proceeds deposited with defendant to the original vendee's account. It was held that payment by check was conditional, and the title had not passed to the vendee, in the absence of negligence or laches.

Com. v. Devlin (1886), 141 Mass. 423, 6 N. E. R. 64, was a criminal case wherein the defendant was charged with obtaining goods under false pretenses. He had agreed to purchase certain sheep for cash, and about an hour after delivery the parties met and the defendant by false pretenses induced the vendor to take a worthless check in payment. It was held that the facts showed an intention that delivery and payment should be substantially concurrent, and the delay of an hour was no waiver on the part of the vendor. The title did not pass until the parties met and

In many cases, moreover, it is practically immaterial whether there was a reservation of the title or a reservation of possession; because, if it were the latter only, the operation of the vendor's lien would adequately protect the seller. That there

agreed about the check, and the goods were therefore obtained by said false pretenses.

In McDonough v. Sutton (1876), 35 Mich. 1, a number of farmers, who had driven their hogs to market, agreed to sell them to the defendant, and he in turn agreed to sell them to the plaintiff, both sales to be for cash. The plaintiff's money not arriving, defendant sold the hogs to another, and while the purchaser was driving them off plaintiff tendered the price and then brought trover. It was held that all parties understood that defendant was not the owner and could not convey title. The property remained in the farmers until they received the purchase price, and defendant was at no time in a position to convey title to any one.

In Welsh v. Bell (1858), 32 Pa. St. 12, the court said: "It is a condition precedent of a sale for cash, in order to pass the property to the vendee, that payment should be made. . . . Yet, even if the contract be for a cash sale, if the thing agreed to be sold be delivered without payment, the property passes to the vendee and is liable to levy and sale as his."

In Hammett v. Linneman (1872), 48 N. Y. 399, a contract of sale was made for a quantity of coal, for cash on delivery. The coal was delivered and mixed with other coal in the defendant's yard. Within two or three days payment was demanded, but the defendant had sold the coal and refused to pay. The court held that defendant had no title, saying that "it was not necessary to stand by the coal while being delivered to the defendant's carts and demand payment for each load before it was carted away, under penalty of waiving the condition upon which the title was to pass. It was sufficient that payment was the condition agreed on, and that a request, in the case of a bulky article like coal, was made for payment promptly, within two or three days after it had been received."

In Dows v. Kidder (1881), 84 N. Y. 121, the plaintiffs sold a cargo of corn to Atkinson & Co., expressly for cash on delivery. They sent a bill to the vendee for the price and made a conditional delivery by delivering the official weigher's return, indorsed by themselves, in order to allow Atkinson & Co. to draw up exchange against the corn; but this delivery was only on the express condition that title should not pass till payment was made. Atkinson & Co. sold the corn and failed, whereupon plaintiffs asserted title. The court said: "Upon the facts found by the referee it is plain that no title to the corn passed from the plaintiffs to Atkinson or to Atkinson & Co. There was an agreement to sell, but payment was to be made in cash on delivery. Payment was thus made a condition precedent, and until the condition was performed the title could not be affected."

In Adams v. O'Connor (1868), 100 Mass. 515, where a cash sale of whisky

are cases, however, in which the question of the reservation of the title must be determined is clear; and to these only the present consideration is devoted: the question of the vendor's lien is fully treated in a later chapter.

was made, the court said: "The sale to the defendants, having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers until the terms of sale had been complied with."

In Wabash Elevator Co. v. Bank (1872), 23 Ohio St. 311, in construing a contract for the sale of wheat, the court said: "The title did not pass. Under the circumstances disclosed by the evidence, there can be no doubt but that the transaction was understood by the parties as a cash sale. . . . A delivery with the expectation of receiving immediate payment is not absolute, but conditional until payment is made, and, where there is no waiver of payment, no title vests in the purchaser till the price is paid." Followed in Hodgson v. Barrett (1877), 33 Ohio St. 63.

So Fenelon v. Hogaboom (1872), 31 Wis. 172, following Goldsmith v. Bryant (1870), 26 Wis. 34, holds that in a cash sale payment is a condition precedent to the passing of the title.

In Ferguson v. Clifford (1858), 37 N. H. 86, which was an action of trover for a church organ, the court said: "We think it was properly left to the jury to find, upon all the evidence before them, whether the sale to Laurence was completed so as to pass the property to him. The price not having been paid, and no evidence being offered tending to show any understanding or agreement that credit was to be given, the court would not have been justified in holding, as a matter of law, that the sale was completed so as to pass the property. The general rule in such cases is, that the price must be paid before the property will pass, although conditional delivery may occur. If delivery takes place, where payment is expected simultaneously therewith, it is in law made upon the condition precedent that the price shall forthwith be paid."

So in Neil v. Cheves (1830), 1 Bailey (S. C.), 537, and Pickett v. Cloud (1830), 1 id. 362, where nothing was said about the time for payment, it was held that payment on delivery was a condition precedent to the vesting of the property.

Mathews v. Cowan (1871), 59 Ill. 341, was a case of trover for wheat sold for cash and never paid for. In such a case the court held that payment was a condition precedent to the passing of the title, and the appropriation of the flour by the defendant was a conversion of the plaintiff's property. To the same effect, Mich. Cent. R. Co. v. Phillips (1871), 60 Ill. 190.

In Lehman v. Warren (1875), 53 Ala. 535, the court had under consideration a contract of sale of cotton made by commission merchants, and the decision was based upon a statute declaring that "no cotton sold by commission merchants to brokers or buyers shall be considered as delivered and the ownership given up until the same is fully paid for." Flanders v. Maynard (1877), 58 Ga. 56, was a similar case and rested upon a like statute.

§ 545. —— Check or draft not payment if dishonored.— Where the sale is thus to be for cash and payment is found to be a condition precedent, it is clear that if the buyer obtains the goods by giving for the price a check or draft which is subsequently dishonored, there is no payment (unless the check or draft was clearly taken as such), and the title does not pass.[1]

§ 546. Giving of note or other security as condition precedent.— Reasons similar to those found applicable in the preceding sections operate where it is agreed that the buyer shall give a note, mortgage or other security for the price. The parties may thus, either expressly or impliedly, make the giving of such note or security a condition precedent to the passing of the title; and where they have done so the title will not pass until the act is performed or its performance has been waived.[2]

§ 547. —— How determined.— Whether the giving of the note or other security is to be a condition precedent is here, as in the former case, usually a question of fact, if the parties have

[1] Mathews v. Cowan (1871), 59 Ill. 341; Hodgson v. Barrett (1877), 33 Ohio St. 63, 31 Am. R. 527; Canadian Bank v. McCrea (1882), 106 Ill. 281; Peoria & Pekin Un. Ry. Co. v. Buckley (1885), 114 Ill. 337; National Bank of Commerce v. Chicago, etc. R. Co. (1890), 44 Minn. 224, 46 N. W. R. 342, 560, 20 Am. St. R. 566; Johnson-Brinkman Com. Co. v. Central Bank (1893), 116 Mo. 558, 22 S. W. R. 813, 38 Am. St. R. 615.

[2] Whitney v. Eaton, 15 Gray (Mass.), 225; Bainbridge v. Caldwell, 4 Dana (Ky.), 211; Young v. Kansas Mfg. Co., 23 Fla. 394; Towne v. Davis, 66 N. H. 396, 22 Atl. R. 450; Harris v. Smith (1817), 3 S. & R. (Pa.) 20; Tyler v. Freeman (1849), 3 Cush. (Mass.) 261; Hill v. Freeman, 3 id. 257; Coggill v. Hartford, etc. R. Co. (1854), 3 Gray (Mass.), 545; Hirschorn v. Canney (1867), 98 Mass. 149; Armour v. Pecker (1877), 123 Mass. 143; Salomon v. Hathaway (1879), 126 Mass. 482; Kenney v. Ingalls, 126 id. 488; Van Duzor v. Allen (1878), 90 Ill. 499; Peabody v. Maguire (1887), 79 Me. 572; Russell v. Minor (1838), 22 Wend. (N. Y.) 659; Osborn v. Gantz (1875), 60 N. Y. 540; Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. R. 49; Adams v. Roscoe Lumber Co. (1899), 159 N. Y. 176, 53 N. E. R. 805. In Nicholson v. Taylor (1858), 31 Pa. St. 128, an estimated amount of lumber was sold at a certain price per thousand, to be paid for by a note at six months. The lumber had to be measured before the exact price could be determined and the note drawn, and no time was set for the measuring. The court held that these facts showed that the contract was executory.

not made their intention clear;[1] and, if it were a condition, the question whether or not its performance has been waived is likewise for the jury.[2]

§ 548. Consideration for the condition.— The consideration for the condition, whether express or implied, is ordinarily found in the same acts or events which supply the consideration for the remainder of the contract. Where, however, the property has once been unconditionally sold and delivered, a subsequent agreement annexing conditions is without consideration and void.[3]

§ 549. —— Waiver of the condition of payment or security.— But as this condition of payment or security, whether express or implied, is, as has been seen, for the benefit of the seller, he may waive it if he so elects. This waiver, like the condition itself, may be either express or implied. Where it is express, no doubt of course can arise as to its existence; but it need not be express, and can be inferred from acts and circumstances. Delivery of the goods without insisting upon the performance of the condition may be such an act. Hence it is well settled that an absolute and unconditional delivery of the goods without requiring payment, or the giving of the security, is to be deemed a waiver of payment as a condition precedent or concurrent;[4] and, in any case, a voluntary de-

[1] Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. R. 49; Towne v. Davis, 66 N. H. 396, 22 Atl. R. 450.

[2] Silsby v. Boston & Albany R. Co. (1900), 176 Mass. 158, 57 N. E. R. 376.

[3] Merrill Furniture Co. v. Hill (1894), 87 Me. 17, 32 Atl. R. 712; Domestic Sewing Mach. Co. v. Anderson (1876), 23 Minn. 57. See also Houser & Haines Mfg. Co. v. Hargrove (1900), 129 Cal. 90, 61 Pac. R. 660.

[4] Fishback v. Van Dusen (1885), 33 Minn. 111; Pinkham v. Appleton, 82 Me. 574; Empire State Co. v. Grant, 114 N. Y. 40; Chapman v. Lathrop, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433; Scudder v. Bradbury, 106 Mass. 422; Goodwin v. Railroad Co., 111 Mass. 487; Freeman v. Nichols, 116 Mass. 309; Haskins v. Warren, 115 Mass. 514; Smith v. Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; Warder v. Hoover, 51 Iowa, 491; Scharff v. Meyer, 133 Mo. 428, 34 S. W. R. 858; Lewenberg v. Hayes, 91 Me. 104, 39 Atl. R. 469; Freeport Stone Co. v. Carey, 42 W. Va. 276, 26 S. E. R. 183; Neal v. Boggan, 97 Ala. 611, 11 S. R. 809; England v. Forbes, 7 Houst.

livery without requiring such payment or security is strong evidence of a waiver, particularly where the rights of third persons have intervened based upon such delivery. Still, whether, in fact, under all the circumstances, there has been a waiver is a question for the jury.[1]

(Del.) 301, 31 Atl. R. 895; Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. R. 712; Oester v. Sitlington, 115 Mo. 247, 21 S. W. R. 820; Wheeler & Wilson Mfg. Co. v. Bank, 105 Ga. 57, 31 S. E. R. 48.

In Fishback v. Van Dusen (1885), 33 Minn. 111, 22 N. W. R. 244, it is said: "The doctrine is uniform and well established that if the vendor unqualifiedly and unconditionally delivers the goods to the vendee without insisting on performance of conditions, intending to rely solely on the personal responsibility of the vendee, the title passes to the latter, and the vendor cannot afterwards reclaim the property, even if the condition is never performed. His only remedy is upon the contract for the purchase-money. 2 Kent, *496; Benj. Sales, § 320, note *d;* Carlton v. Sumner, 4 Pick. 516; Smith v. Dennie, 6 Pick. 262, 17 Am. Dec. 368; Dresser Mfg. Co. v. Waterston, 3 Met. 9; Farlow v. Ellis, 15 Gray, 229; Goodwin v. Railroad Co., 111 Mass. 487; Scudder v. Bradbury, 106 Mass. 422; Haskins v. Warren, 115 Mass. 514; Freeman v. Nichols, 116 Mass. 309; Bowen v. Burk, 13 Pa. St. 146; Mixer v. Cook, 31 Me. 340. The weight of authority seems to be that a delivery, *apparently* unrestricted and unconditional, of goods sold for cash, is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser. Scudder v. Bradbury, 106 Mass. 422; Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Hammett v. Linneman, 48 N. Y. 399; Smith v. Lynes, 5 N. Y. 41; Farlow v. Ellis, *supra.*"

[1] Fishback v. Van Dusen, *supra;* Young v. Kansas Mfg. Co. (1887), 23 Fla. 394 [citing Whitney v. Eaton, 15 Gray (Mass.), 225; Farlow v. Ellis, 15 Gray, 229; Armour v. Pecker, 123 Mass. 143; Salomon v. Hathaway, 126 Mass. 482]; Peabody v. Maguire (1887), 79 Me. 572.

Asking for, and being promised, security, which is not given, is not a waiver of the condition. Sargent v. Metcalf, 5 Gray (Mass.), 306, 66 Am. Dec. 368. A contract for the sale of three hundred barrels of flour to be delivered in lots of one hundred barrels each, each lot to be paid for on delivery, is severable, and delivery and receipt of payment for the last two lots do not constitute a waiver of any rights of the seller arising out of the unauthorized delivery of the first lot by a railroad company to the purchaser without payment. Sawyer v. Railway Co., 22 Wis. 402, 99 Am. Dec. 49.

The fact that the seller loaded the goods into cars, in pursuance of his contract, is not a waiver. Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153, 46 N. W. R. 306. Nor the fact that the seller helped the buyer to put them into cars, where, under the contract, they were to be paid for. Meeker v. Johnson, 3 Wash. 247, 28 Pac. R. 542.

But knowingly to mark logs with the log-mark of the purchaser — rec-

§ 550. —— Delivery to carrier as waiver.— An unconditional delivery of the goods to a carrier for transportation to the buyer is just as effectual to waive the condition as a personal delivery to the buyer. Such a delivery is equivalent to a delivery to the purchaser, subject to the right of stoppage *in transitu*. If, in such a case, the seller desires to retain the *jus disponendi*,[1] he must do it by taking the bill of lading in his own name, or in some other similar manner indicating his intention not to pass the title until payment; otherwise the title passes and the condition is waived.[2]

§ 551. —— Further of waiver.— It is not necessarily to be inferred, where a conditional bargain has been made and a delivery has immediately taken place upon the expectation that the promised payment or security will shortly be given, that the sale *ipso facto* becomes absolute. There is always an implied understanding that the vendee is acting honestly and that he takes the goods subject to the contract. It is not necessary, therefore, that the vendor shall in express terms declare that he makes the delivery conditional; it is sufficient if the intent of the parties that the delivery is conditional can be inferred from their acts and the circumstances of the case.[3] Waiver is the voluntary relinquishment of some right which, but for such waiver, the party would have enjoyed. Voluntary choice is of the essence of waiver, and not mere negligence, though from

ognized by the laws of the State as the *indicia* of ownership — is a waiver. Hance v. Boom Co. (1888), 70 Mich. 227, 38 N. W. R. 228.

Ratification.— Where there was a sale for cash, but the vendee obtained the goods without payment, and then sold them to another, and the first seller with full knowledge took a note from the last purchaser for the price, this constitutes an abandonment of the sale as for cash and ratifies the disposition made of the goods. Bullard v. Bank of Madison (1899), 107 Ga. 772, 33 S. E. R. 684.

[1] See *post*, ch. VI, on Reservation of Jus Disponendi.

[2] Scharff v. Meyer (1895), 133 Mo. 428, 34 S. W. R. 858, 54 Am. St. R. 672.

[3] Smith v. Dennie (1828), 6 Pick. (Mass.), 262, 17 Am. Dec. 368; Fishback v. Van Dusen, 33 Minn. 111; Leven v. Smith, 1 Denio (N. Y.), 571; Peabody v. Maguire, 79 Me. 572; Merrill Furn. Co. v. Hill, 87 Me. 17, 32 Atl. R. 712; Farlow v. Ellis, 15 Gray (Mass.), 229; Paul v. Reed, 52 N. H. 136.

such negligence, if unexplained, an intention to waive may be inferred.

§ 552. ——. The important question, therefore, is: Has the vendor manifested, by his language or conduct, an intention or willingness to waive the condition, and make the delivery unconditional, and the sale absolute, without having received payment or the performance of the conditions of the sale? This must depend upon the intent of the parties at the time, to be ascertained from their conduct and language, and not from the mere fact of delivery alone. Whether there has been a waiver is a question of fact. It may be proved by various species of evidence: by declarations, by acts, or by forbearance to act. But however proved, the question is: Has the vendor voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition?[1]

§ 553. ——. No secret or undisclosed intention of the seller is sufficient of itself to make a delivery conditional;[2] and where the delivery is absolute and unconditional, usage alone cannot operate to defeat its effect as a waiver.[3]

§ 554. Goods may be retaken if condition not performed. Where payment of the purchase-money, or the giving of security for it, is thus expressly or impliedly a condition precedent to the passing of the title, and the making of the payment or the giving of the security is omitted, evaded or refused by the purchaser upon obtaining possession of the goods, the delivery is deemed to be conditional, and the seller may immediately reclaim and recover the goods themselves or their value in

[1] Fishback v. Van Dusen, *supra;* Carleton v. Sumner, 4 Pick. (Mass.) 516; Smith v. Dennie, *supra;* Fuller v. Bean, 34 N. H. 290; Hammett v. Linneman, 48 N. Y. 399; Peabody v. Maguire, *supra;* Stone v. Perry, 60 Me. 48; Seed v. Lord, 66 Me. 580; Smith v. Lynes, 5 N. Y. 41; Farlow v. Ellis, *supra;* Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. R. 306; Silsby v. Boston & Albany R. Co., 176 Mass. 158, 57 N. E. R. 376.

[2] Fishback v. Van Dusen, *supra;* Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Haskins v. Warren, 115 Mass. 514; West v. Platt, 127 Mass. 367.

[3] Haskins v. Warren, 115 Mass. 514.

trover, either from the original purchaser[1] or from any one claiming title through or under him,[2] though it is said that, at least in the case of an implied condition, a waiver of the condition will be more readily inferred for the protection of the sub-vendee.[3]

§ 555. —— Even from bona fide purchaser.— Thus, where goods were sold and delivered to be paid for in cash on delivery, and the purchaser gave the seller a check which was dishonored on presentation, it was held that the seller might retake the goods,[4] if he had done nothing to estop himself, even from an innocent sub-vendee for value.[5] And the right to re-

[1] Whitwell v. Vincent (1827), 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Reed v. Upton (1830), 10 Pick. (Mass.) 522, 20 Am. Dec. 545; Barrett v. Pritchard (1824), 2 Pick. 512, 13 Am. Dec. 449; Fishback v. Van Dusen (1885), 33 Minn. 111; Peabody v. Maguire (1887), 79 Me. 572; Ferguson v. Clifford, 37 N. H. 86; Bainbridge v. Caldwell, 4 Dana (Ky.), 213; Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311; Bauendahl v. Horr, 7 Blatchf. (U. S. C. C.) 548; Harding v. Metz, 1 Tenn. Ch. 610; Thorpe v. Fowler, 57 Iowa, 541; Paul v. Reed, 52 N. H. 136; Dows v. Kidder, 84 N. Y. 121; Evansville, etc. R. Co. v. Erwin, 84 Ind. 457; Harris v. Smith, 3 Serg. & R. (Pa.) 20; Morris v. Rexford, 18 N. Y. 552.

[2] In National Bank of Commerce v. Chicago, B. & N. R. Co. (1890), 44 Minn. 224, 46 N. W. R. 342, 560, 20 Am. St. R. 566, it is said: "It is urged that a different rule applies where, intermediately, the property has been purchased by an innocent sub-vendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has, unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a sub-vendee, than as to the original purchaser, except perhaps that, as to the former, a waiver of the condition, as, for example, of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express but implied. See Benjamin on Sales, Am. note 269; Coggill v. Railroad Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 149; Armour v. Pecker, 123 Mass. 143."

[3] National Bank v. Railroad Co., *supra*.

[4] National Bank v. Railroad Co., *supra;* Hodgson v. Barrett (1877), 33 Ohio St. 63, 31 Am. R. 527; Johnson-Brinkman Com. Co. v. Central Bank (1893), 116 Mo. 558, 22 S. W. R. 813, 38 Am. St. R. 615; Canadian Bank v. McCrea (1882), 106 Ill. 281; Peoria & Pekin Un. Ry. Co. v. Buckley (1885), 114 Ill. 337; Mathews v. Cowan (1871), 59 Ill. 341.

[5] National Bank v. Railroad Co.,

cover the goods has been sustained where the purchaser was to give an indorsed note, or a mortgage or other security for the price, which he failed or refused to do.[1]

§ 556. —— **And clearly from attaching creditors, etc.**— The right to retake extends also *a fortiori* as against the creditors of the purchaser who have seized the goods for debts due themselves,[2] and against the purchaser's assignee in bankruptcy.[3]

§ 557. —— **Usage does not defeat.**— This right of the seller to reclaim his goods is one which cannot be defeated by any local usage.[4]

2. *Payment of Price as Express Condition Precedent to Passing of Title, and Herein of So-called "Conditional Sales" or "Instalment Contracts."*

§ 558. **Formal contracts of so-called "conditional sales."** The contracts of sale conditioned upon payment which have thus far been considered have been those in which, either expressly or impliedly, the payment was to be made at, or shortly after, the delivery of the goods, no extended period of credit being contemplated or agreed upon.

The exigencies of business, however, have given rise to an entirely different class of contracts, to which the term "con-

supra. See also Andrew v. Dieterich (1835), 14 Wend. (N. Y.) 31 (but as to this case see 3 Barb. Ch. 451); Adams v. Roscoe Lumber Co. (1899), 159 N. Y. 176, 53 N. E. R. 805.

[1] Whitwell v. Vincent (1827), 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Davison v. Davis (1887), 125 U. S. 90; Sargent v. Metcalf, 5 Gray (Mass.), 306, 66 Am. Dec. 368; Leatherbury v. Connor (1891), 54 N. J. L. 172.

[2] Mack v. Story (1889), 57 Conn. 407. "The vendor has a right to repossess himself of the goods, not only as against the vendee, but also against his creditors, claiming to hold them under attachments. Everett v. Hall, 67 Me. 498; Brown v. Haynes, 52 Me. 580." Peabody v. Maguire, 79 Me. 572.

[3] Rogers v. Whitehouse (1880), 71 Me. 222; Ballantyne v. Appleton, 82 Me. 570, 20 Atl. R. 235; Whitney v. Eaton (1860), 15 Gray (Mass.), 225.

[4] Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. R. 306; Silsby v. Boston & Albany R. Co. (1900), 176 Mass. 158, 57 N. E. R. 376.

ditional sale" has been popularly applied, and which contemplate a delivery of the goods to the prospective purchaser upon a more or less extended term of credit, subject nevertheless to the condition that the title shall remain in the vendor until the price is paid. The price, moreover, is frequently made payable in instalments, and from this fact the term "instalment contract" is often applied to these agreements. Their purpose is to facilitate sales and purchases upon credit, and especially to avoid the publicity and statutory regulation of chattel mortgages.

§ 559. **Confusion respecting the name.**— It will be evident to any one who has occasion to examine the cases that the term "conditional sale" has been indiscriminately applied to a great variety of differing transactions, and that much confusion has resulted therefrom. It will be further evident that this confusion is the legitimate result and natural consequence of the ill-advised efforts of the framers of these agreements to make them appear to be what they are not; and that by their very efforts to force a particular appearance upon such agreements without construction, they have most effectually invited and required the application of legal rules of construction to arrive at their true intent. In applying these rules here, as in other cases in which intent is to be sought after, different courts will inevitably come to different conclusions often in respect to instruments substantially alike.

§ 560. **What is a conditional sale.**— It will be evident also that confusion has arisen from the use of words in different senses. What is meant by the term "conditional sale?" In order to answer this question, it is necessary to determine first what is meant by the word "sale." As has been seen in the opening sections of this work, the word "sale," in actual use, is not a word of precise legal import. It is constantly being used to mean either the actual *transfer* of the title, or the *agreement* to transfer the title. If the first meaning be adopted, then obviously the only conditional sale possible is the present trans-

fer subject to be defeated by a condition subsequent. If, on the other hand, the second definition be adopted, a conditional sale is a conditional contract to convey, and the condition will usually, if not always, be a condition precedent.

This is more than a mere dispute about words, because it will be seen that substantial differences in result ensue according as the one view or the other is adopted.

§ 561. —— What varieties are possible.— The very nature of the case shows that these various forms of agreement are usually intended to be bargainings about sales to be made, and not perfect and completed sales in themselves. The question then is: What forms of agreement may there be amounting to less than a present unconditional and perfect sale? The answer to this is plain:

1. There may be the ordinary agreement, on the one part to sell, and on the other part to buy, a particular chattel. Here the seller is entitled to keep the chattel until the other party pays for it.

2. There may be the ordinary executory agreement above mentioned, and annexed to it a voluntary delivery of the property to the prospective purchaser to be kept by him as the property of the seller until he demands it, if not sooner paid for. This is the executory agreement, plus a bailment.

3. There may be the executory agreement as before, but as part of it an express or implied agreement that the seller shall deliver the chattel to the prospective buyer to be kept and used by him until he makes default in his performance of the agreement (at which time the seller may resume possession), the title to the chattel remaining nevertheless in the seller until the price is paid.

4. There may be a present transfer of the title and of the possession, subject to a right in the seller to rescind the transfer, and have back the title and possession upon default in payment.

5. There may be a present transfer of title and possession, reserving a lien upon the chattel as security for the payment of the price.

6. There may also be a present transfer of title and possession, and a formal chattel mortgage taken by the seller to secure payment.

§ 562. ——. Of these, the *first* is clearly not within the class now being considered.

The *second* and *third* are in many respects alike, but the third has the additional feature that the purchaser acquires by the contract a right to the possession of the chattel of which he can only be deprived upon a default in pursuance of the provisions of the contract.

The *fourth* is the true conditional sale, *i. e.*, a present sale subject to defeat upon a condition subsequent.

The *fifth* and *sixth* are alike in their result; the former being an informal mortgage and the latter a formal one.

The second and third are the kinds of agreement ordinarily meant by the popular use of the term "conditional sale," but the cases are numerous where courts have used the same term meaning sometimes an agreement of the second or third kind, and sometimes one of the fourth.

§ 563. —— **What here meant by conditional sale.**—Adopting for the present the popular signification of the term, it is of agreements of the second and third kinds, namely, executory contracts of sale accompanied by a delivery of the chattel to the purchaser to be held by him pending payment, either at the will of the seller or until default in performance by the buyer of some term of the agreement, the title, however, being reserved by the seller until payment by the purchaser — that it is now proposed to treat.

§ 564. **Validity and form of "conditional sales."** — These contracts of "conditional sale" are entirely lawful,[1] unless prohibited by statute, and they may, in general, take such form

[1] See Warren v. Liddell, 110 Ala. 232, 20 S. R. 89; Rodgers v Bachman, 109 Cal. 552, 42 Pac. R. 448; Van Allen v. Francis, 123 Cal. 474, 56 Pac. R. 339; Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. R. 379; Cooley v. Gillan, 54 Conn. 80, 6 Atl. R. 180; Steele v. Aspy, 128 Ind. 367, 27 N. E.

as the parties see fit to give them.[1] They are not required to be in writing,[2] nor are they required to be filed or recorded,[3] unless a statute, as now in many States,[4] declares otherwise.

It is, however, essential that a reservation of the title shall appear; for the parties may intend to reserve the title in the seller and yet so frame their agreement as not to accomplish this purpose,[5] or such a reservation may have been originally

R. 739; Morse v. Sherman, 106 Mass. 430; Harkness v. Russell, 118 U. S. 663; Bradshaw v. Thomas, 7 Yerg. (Tenn.) 497; Edgewood Distilling Co. v. Shannon, 60 Ark. 133, 29 S. W. R. 147; McGinnis v. Savage, 29 W. Va. 362; Edison Gen'l Elec. Co. v. Walter, 10 Wash. 14, 38 Pac. R. 752; Hirsch v. Steele, 10 Utah, 18, 36 Pac. R. 49, and the many cases cited in following sections.

[1] See Rodgers v. Bachman, *supra;* Edgwood Distilling Co. v. Shannon, *supra;* Edison Gen'l Electric Co. v. Walter, *supra;* Page v. Edwards, 64 Vt. 124, 23 Atl. R. 917. Condition printed upon the back of a note and referred to in it is sufficient. Seymour v. Farquhar, 93 Ala. 292.

[2] Benner v. Puffer, 114 Mass. 376; McIver v. Williams, 83 Wis. 570, 53 N. W. R. 847; Wise v. Collins, 121 Cal. 147, 53 Pac. R. 640.

[3] Warren v. Liddell, 110 Ala. 232, 20 S. R. 89; Campbell Printing Press Co. v. Walker, 22 Fla. 412. Are not chattel mortgages within the acts requiring such instruments to be filed or recorded. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; McComb v. Donald, 82 Va. 903; Lima Mach. Works v. Parsons, 10 Utah, 105, 37 Pac. R. 244. Though where the negotiations amount to a chattel mortgage in fact, it is void if not in writing in Texas. Harrold v. Barwise, 10 Tex. Civ. App. 138, 30 S. W. R. 498; Lazarus v. Bank, 72 Tex. 354, 10 S. W. 252.

[4] These statutes are referred to *post*, § 603, note.

[5] Thus, as will be more fully seen in later sections, though the parties may have intended to make a conditional sale, the true construction of their words and conduct may show that they have made an absolute sale, reserving, perhaps, a lien upon the goods but not the title to them; as in Aultman v. Silha, 85 Wis. 359, 55 N. W. R. 711; Andrews v. Colorado Savings Bank, 20 Colo. 313, 36 Pac. R. 902, 46 Am. St. R. 291; Arkansas Cattle Co. v. Mann, 130 U. S. 69; Beardsley v. Beardsley, 138 U. S. 262; First Nat. Bank v. Cook Carriage Co., 70 Miss. 587; Palmer v. Howard, 72 Cal. 293, 13 Pac. R. 858, 1 Am. St. R. 60. Other illustrations are given in later notes.

In Silver Bow Mining Co. v. Lowry, 6 Mont. 288, the contract was in form one of conditional sale, but a note was taken for the price secured by mortgage upon other property, and this was held to render the sale absolute.

But the fact that a printed form clearly of conditional sale has attached to it a typewritten "rider" providing for a mortgage upon the chattels to secure the payment of the price does not defeat its character as a conditional sale. Edison Gen'l Electric Co. v. Walter, 10

contemplated and yet have been subsequently waived or ignored.

If the whole agreement is in writing, its construction will be for the court, aided by such extrinsic circumstances as throw light upon the intention;[1] but where the intention is to be gathered from words and conduct, the question is pre-eminently for the jury.[2]

§ 565. —— Contract in form absolute shown to be conditional.— Even though the delivery was accompanied by a bill of sale apparently absolute, the transaction may be shown to have been conditional;[3] and parol evidence is admissible for this purpose as between the original parties or others having notice, though not, of course, as against *bona fide* purchasers for value.[4]

So, though the delivery and sale were at first absolute, it may, upon sufficient consideration, be subsequently made conditional; and while the whole transaction still remains executory, a sale originally intended to be absolute may by agreement be made conditional.[5]

Wash. 14, 38 Pac. R. 752. See also Page v. Edwards, 64 Vt. 124, 23 Atl. R. 917.

[1] Palmer v. Howard, *supra;* Andrews v. Colorado Savings Bank, *supra;* Aultman v. Silha, *supra.*

[2] Scudder v. Bradbury, 106 Mass. 422; Armour v. Pecker, 123 Mass. 143; Gurney v. Collins, 64 Mich. 458; Segrist v. Crabtree, 131 U. S. 287; Claflin v. Furniture Co., 58 N. J. L. 379; Rohn v. Dennis, 109 Pa. St. 504.

[3] Smith v. Tilton, 10 Me. 350. It being evident that part of the contract rested in parol, parol evidence is properly admissible, although the order and acceptance were in writing. Burditt v. Howe, 69 Vt. 563, 38 Atl. R. 240.

[4] Nor, in Vermont, against attaching creditors who have relied upon its absolute appearance in making their attachments. Dixon v. Blondin, 58 Vt. 689; Sanborn v. Chittenden, 27 Vt. 171. Where seller gave an absolute bill of sale he will not be permitted, say the court in Connecticut, to show that, by contemporaneous parol agreement, the sale was conditional, to the prejudice of a *bona fide* purchaser, attaching creditor or trustee in insolvency. Ryder v. Cooley, 58 Conn. 367, 20 Atl. R. 470.

[5] Goss Printing Press Co. v. Jordan, 171 Pa. St. 474, 32 Atl. R. 1031. But the intent to change must be clear. Caraway v. Wallace, 2 Ala. 542. And in Vermont a change of possession was held necessary, as against creditors. Wright v. Vaughn, 45 Vt. 369.

§ 566. —— Fact that promise to pay is absolute does not make sale absolute.— On the other hand, the fact that the vendee's promise to pay is absolute does not necessarily deprive the contract of its conditional character and make it absolute.[1] In a doubtful case it would be suggestive, but it is not conclusive; and, indeed, as will be seen,[2] the absolute character of the vendee's obligation — at least where the vendor elects so to treat it — is a common characteristic of these contracts.

§ 567. Construction of such contracts.— As has been already seen, contracts intended to fall within the class now under consideration have been made in every variety of form, and many different names have been applied to them. They have often been purposely given the form or name of some other contract, in order to disguise their real nature. This has led to much difficulty in determining what is the true construction to be given them. "The answer to this question," said the supreme court of the United States,[3] "is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

§ 568. —— Declaration of parties not conclusive.— The mere fact that the parties declare that their agreement shall not amount to a sale, or shall not be construed in any other manner, is not conclusive. They cannot, by their agreement, control the operation of the rules of construction.[4]

[1] Perkins v. Mettler (1899), 126 Cal. 100, 58 Pac. R. 384; Van Allen v. Francis (1897), 123 Cal. 474, 56 Pac. R. 339; Harkness v. Russell, 118 U. S. 663.

[2] See *post*, § 625. But see §§ 578, 579.

[3] In Heryford v. Davis (1880), 102 U. S. 235.

[4] Heryford v. Davis, *supra;* Greer v. Church, 13 Bush (Ky.), 430; Dederick v. Wolfe, 68 Miss. 500, 9 S. R. 350, 24 Am. St. R. 283; Gerow v. Castello, 11 Colo. 560, 7 Am. St. R. 260, 19 Pac. R. 505.

§ 569. —— Instruments in form of lease held to be conditional contracts to sell.—In very many of the cases the instrument in question has been called a lease, and much of the language used has been such as would be appropriate to a lease. It is, of course, entirely competent for parties to make leases of chattels, but the instrument will not be deemed a lease where its contents and evident purpose show that some other construction is demanded. Hence the cases are numerous in which instruments called leases have been held to be conditional contracts to sell,[1] that is, agreements to sell with payment made a condition precedent to the passing of the title, notwithstanding that the parties have expressly stipulated that no such construction should be put upon their contract.[2]

[1] Hine v. Roberts, 48 Conn. 267, 40 Am. R. 170; Loomis v. Bragg, 50 Conn. 228, 47 Am. R. 638; Singer Mfg. Co. v. Cole, 4 Lea (Tenn.), 439, 40 Am. R. 20; Cowan v. Singer Mfg. Co., 92 Tenn. 376, 21 S. W. R. 663; Singer Mfg. Co. v. Graham, 8 Oreg. 17, 34 Am. R. 572; Gerow v. Castello, 11 Colo. 560, 19 Pac. R. 505, 7 Am. St. R. 260; Hays v. Jordan, 85 Ga. 741, 11 S. E. R. 833, 9 L. R. A. 373; Cottrell v. Bank, 89 Ga. 508, 15 S. E. R. 944; Ross v. McDuffie, 91 Ga. 120, 16 S. E. R. 648; Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124; Lucas v. Campbell, 88 Ill. 447; Gerrish v. Clark, 64 N. H. 492, 13 Atl. R. 870; Hill v. Townsend, 69 Ala. 286; Sumner v. Woods, 67 Ala. 139; Hegler v. Eddy, 53 Cal. 597; Parke, etc. Co. v. Lumber Co., 101 Cal. 37, 35 Pac. R. 442; Lundy Furniture Co. v. White, 128 Cal. 170, 60 Pac. R. 759; Kohler v. Hayes, 41 Cal. 455; Watertown S. C. Co. v. Davis, 5 Del. 192; Forrest v. Hamilton, 98 Ind. 91; Budlong v. Cottrell, 64 Iowa, 234; Fleck v. Warner, 25 Kan. 492; Chase v. Ingalls, 122 Mass. 381; Cole v. Berry, 42 N. J. L. 308; Sage v. Sleutz, 23 Ohio St. 1; Carpenter v. Scott, 13 R. I. 477; Matthews v. Lucia, 55 Vt. 308; Fosdick v. Schall, 99 U. S. 235; Whelan v. Couch, 26 Grant Ch. 74; De St. Germain v. Wind, 3 Wash. Ter. 189; Quinn v. Parke, etc. Co., 5 Wash. 276, 31 Pac. R. 866; Whitcomb v. Woodworth, 54 Vt. 544; Collender Co. v. Marshall, 57 Vt. 232; Gorham v. Holden, 79 Me. 317, 9 Atl. R. 894; Gross v. Jordan, 83 Me. 380, 22 Atl. R. 250; Campbell v. Atherton, 92 Me. 66, 42 Atl. R. 232; Ham v. Cerniglia, 73 Miss. 290, 18 S. R. 577; Puffer v. Lucas, 112 N. C. 377, 17 S. E. R. 174; Clark v. Hill, 117 N. C. 11, 23 S. E. R. 91, 53 Am. St. R. 574; Singer Mfg. Co. v. Gray, 121 N. C. 168, 28 S. E. R. 257; Wilcox v. Cherry, 123 N. C. 79, 31 S. E. R. 369; Wickes v. Hill, 115 Mich. 333, 73 N. W. R. 375; Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. R. 811; Sanders v. Wilson, 19 D. C. (8 Mackey), 555.

[2] See Gerow v. Castello, 11 Colo. 560, 7 Am. St. R. 260; Gross v. Jordan, 83 Me. 380, 22 Atl. R. 250; Hays v. Jordan,

§ 570. ——. This result has been almost uniformly reached in those cases, now so common, in which, by the terms of the contract, one party purports to lease or rent to another personal property delivered into his possession upon his agreeing to pay stipulated sums as rent, upon the payment of which he is to become the owner of the property; but further stipulating that if such sums are not paid the other party may terminate the lease and retake the property. Usually the instalments of "rent" to be paid in these cases are out of any proportion to the fair rental value of the property for the periods fixed; the aggregate of the instalments is always the agreed value of the property, and when the total rent is paid the lessee becomes the owner. To call such contracts *leases* is, it is said, a mere subterfuge which cannot deceive the court as to their true character and purpose.[1]

§ 571. ——. In a few cases, however, not easily distinguishable from those last referred to, the courts have held that the instrument involved was really a lease with an option in the lessee to become the owner.[2]

85 Ga. 741. 9 L. R. A. 373; Hervey v. Locomotive Works, 93 U. S. 664; Heryford v. Davis, 102 U. S. 235; Dederick v. Wolfe. 68 Miss. 500. 24 Am. St. R. 283; Cowan v. Singer Mfg. Co., 92 Tenn. 376, 21 S. W. R. 663.

[1] In Hays v. Jordan, *supra*, the court say: "Although the contract does use the term 'rent,' and states that the notes are given for the 'use' of the piano, we do not so construe it, but regard it, not as a lease or renting, but as a conditional sale with title reserved in the vendor until the purchase price is paid. Guilford v. McKinley, 61 Ga. 232. The entire $350 styled 'rent' is made payable within six months from the date of the transaction, and is the stipulated value of the piano, and the consideration for a bill of sale to be given when the full amount is paid; and the sale of the piano, and not the renting thereof, is evidently the real end and basis of the contract."

[2] Thus in Southern Music House v. Dusenbury, 27 S. C. 464, 4 S. E. R. 60, an agreement in form of a lease for an organ, worth $95, for the use of which the lessee was to pay $10 per month, and which gave him the right, at any time during the rental period, to "purchase said instrument by paying the above valuation therefor, and then, and in that case only, all amounts theretofore paid as rental or advance deposit shall be deducted from price of instrument," was held to be a lease with an option to purchase. Talmadge v. Oliver, 14 S. C. 522; Straub v. Screven, 19 S. C. 445,

§ 572. —— **Instruments in form of lease construed to be sales upon condition subsequent.**— But in other cases of instruments denominated leases courts have held them to amount to true conditional sales, *i. e.*, present sales subject to be defeated upon a condition subsequent, namely, upon non-payment. Thus, in a leading case,[1] upon this view of the contract, a piano had been delivered under an agreement called a lease, the party taking it paying $50 on delivery as rent for the first month and agreeing to pay $50 a month rent for thirteen months thereafter. If within thirteen months he should pay $700 the piano should become his property, in which case all sums paid as rent were to apply as part of the $700 purchase price. "It was a mere subterfuge," said the court, "to call this transaction a lease; and the application of that term in the written agreement between the parties does not change its real character. It was a conditional sale, with a right of rescission on the part of the vendor in case the purchaser should fail in payment of his instalments."

§ 573. ——. This view of these agreements, differing radically, as will be seen, from that of the previous sections, has not been generally followed in other States,[2] though it has been followed in Colorado.[3] The same rule also prevails in Massa-

and Herring v. Cannon, 21 S. C. 212, were distinguished. The same form of instrument received the same construction in the later case of Southern Music House v. Hornsby, 45 S. C. 111, 22 S. E. R. 781, although the court below had characterized it as "extreme doctrine." In Singer Mfg. Co. v. Smith, 40 S. C. 529, 19 S. E. R. 132, an instrument similar in all respects except that it reserved no option to purchase was construed as a sale with lien reserved. In Guest v. Diack, 29 Nova Scotia, 504, a contract substantially like that of the Southern Music House, *supra*, except that upon a payment the seller agreed to deliver, not necessarily the same piano, but "one piano, equal in value to the above-named piano," was held, two judges dissenting, not to be a conditional sale.

[1] Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455. See also Lucas v. Campbell, 88 Ill. 447.

[2] See criticisms upon this case in Sauders v. Heber, 28 Ohio St. 636, where it is said to stand almost alone and to be contrary to the weight of authority.

[3] Gerow v. Castello, 11 Colo. 560, 19 Pac. R. 505, 7 Am. St. R. 260. But see Andrews v. Colorado Savings Bank, 20 Colo. 313, 36 Pac. R. 902, 36 Am. St. R. 291.

chusetts, where such contracts are regarded as conditional sales, "liable to be defeated by non-performance of the condition," but "which could be ripened into an absolute title by the performance of the conditions."[1]

§ 574. —— Instruments in form of leases held to be absolute sales reserving a lien or constituting chattel mortgages. But in yet other cases of instruments denominated leases, courts have reached still different conclusions as to their effect, based upon language thought to disclose a different intention. Thus, in a leading case[2] in the supreme court of the United States, the agreement was held to be neither a lease nor a conditional sale, but a mortgage. In that case it appeared that a number of cars had been delivered to a railroad company under a contract which "industriously and repeatedly" spoke of the arrangement as a loan for hire. Still, notes had been given for the amount of the rent, secured by collateral, and they fell due before the term of the lease expired, and were clearly intended to be collected at maturity. If they were duly paid, the cars were to become the property of the railroad company; if they were not paid, the cars might be sold for the payment of the notes, and any surplus was to be returned to the railroad company.

§ 575. ——. "In view of these provisions," said the court, "we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, that the ownership of the cars should pass at once to the railroad company, in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes

[1] Day v. Bassett, 102 Mass. 445; Currier v. Knapp, 117 Mass. 324; Newhall v. Kingsbury, 131 Mass. 445; Vincent v. Cornell, 13 Pick. 294.

[2] Heryford v. Davis (1880), 102 U. S. 235.

or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

§ 576. ——. The same result has also been reached in other cases less readily distinguishable from those in the preceding sections than the one just referred to.[1]

§ 577. —— **Instruments in form of conditional sale held to be absolute sales reserving a lien or mortgages.**— Cases, further, are not infrequent in which instruments denominated, or in the form of, conditional sales have been held to constitute executed and absolute sales with a lien reserved. In a somewhat clear case[2] before the supreme court of the United

[1] The same result, *i. e.*, that the agreement was a sale with a lien reserved, was reached in Greer v. Church (1877), 13 Bush (Ky.), 430, where the court says: "In this case the transaction shows a sale, and that being shown, it does not matter whether the parties intended the title to pass or not; the sale being completed by an agreement as to the price and terms of payment and delivery of possession to the vendee, the law, in furtherance of public policy and to prevent fraud, will treat the title as being where the nature of the transaction required it should be;" and that "at best the effect was to give the appellees a lien" as against the purchaser; and in Knittel v. Cushing, 57 Tex. 354, 44 Am. R. 598, where Greer v. Church was approved, and where the court say of the so-called lease: "If a valid instrument at all, it must be held to be a sale, and that the pretended renting was but a device to secure the remainder of the purchase-money due;" and in Palmer v. Howard, 72 Cal. 293, 1 Am. St. R. 60, where the court follows Heryford v. Davis, upon the ground that, in the case at bar, "the intention must be taken to have been to transfer the ownership of the property, reserving a security for the price, and nothing more."

[2] Beardsley v. Beardsley (1890), 138 U. S. 262.

In Arkansas Cattle. Co. v. Mann (1888), 130 U. S. 69, the court, in construing a contract relating to the sale of cattle, said: "That instrument recites that the owners had, on the day of its execution, 'sold' the cattle, and that recital is followed by clause guaranteeing the title and providing the mode in which the buyer was to make payment. Here are all the elements of an actual sale, as distinguished from an executory agreement. The retention of possession by the sellers until, and as security for, the payment of the price, was not inconsistent with an actual sale by which title passed to the buyer."

States, the contract read: "I hold of the stock of the Washington and Hope Railway Company . . . thirteen hundred and fifty shares, which is sold to P. F. B., and which, though standing in my name, belongs to him, subject to a payment of eight thousand dollars," etc. Said the court: "By the appellant it is claimed that this is a mere executory contract, an agreement to sell; by the appellee, that it is an executed contract, a sale with a reservation of security. The distinction is obvious, and the significance important. If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed contract, a completed sale, then the moving party is the vendor, the security holder, and he assumes all the burdens and risks of delay. What, therefore, is the significance and import of this instrument? This, as claimed by the appellant, is not to be determined by any separate clause, but by the instrument as a whole. . . . Tested by this rule, this instrument must be adjudged not a contract to sell, but a sale with reservation of security. Note the language of the instrument: 'which is sold.' Again, 'which, though standing in my name, belongs to him.' These words imply nothing executory, but something executed. It is not that the vendor will sell, but has sold. Not that the title remains in the vendor, yet to be transferred, but that it already has been transferred. The ownership, equitable if not legal, is in the vendee. It is not that the stock belongs to the vendee, upon payment, as appeared in the case of *French v. Hay*,[1] but that it is now his, subject to a lien. Its meaning is, therefore, that of a sale, with retention of the legal title as security for purchase-money. It is an equitable mortgage, and the rights created and assumed by it are like those created and assumed when the owner of real estate conveys by deed to a purchaser, and takes back a mortgage as security for the unpaid purchase-money."

[1] 22 Wall. (89 U. S.) 231.

§ 578. ——. In a somewhat different case in Colorado,[1] it appeared that Andrews & Co. had bargained to one Smith a quantity of opera chairs which were put into the latter's opera house. After the making of the contract, but before the chairs had been delivered, Smith had mortgaged the opera house and contents to the Colorado Savings Bank, and in an action by the bank to foreclose its mortgage Andrews & Co. intervened, claiming to be the owners of the chairs. The contract between Andrews & Co. and Smith provided for payment of one-fourth of the price in cash and of the residue by his notes; and it expressly stipulated that the title should be and remain in Andrews & Co. until the whole was paid. This contract was duly filed, but was not executed or acknowledged as required for chattel mortgages. The decisive question, said the court, was "whether the arrangement under and in pursuance of which the seating was furnished constitutes a conditional sale, or an absolute sale and transfer of ownership, with a reservation of a lien to secure the payment of the purchase price. If the latter, it must be conceded that it is in effect a chattel mortgage, and void as to third parties, because not executed and acknowledged in conformity with the chattel-mortgage act. In determining this question the entire transaction between intervenors and Smith must be considered, and its legal effect ascertained, not alone by any particular provisions of the written contract itself, but from all the stipulations and agreements contained therein, as well as in the notes given in connection therewith. When so considered it is evident, notwithstanding the agreement itself provides that the title to the seating shall remain in Andrews & Co. until full payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement, they being absolute obligations, making the purchaser unconditionally liable

[1] Andrews v. Colorado Savings Bank (1894), 20 Colo. 313, 36 Pac. R. 902, 36 Am. St. R. 291. Very similar in substance is Palmer v. Howard (1887), 72 Cal. 293, 13 Pac. R. 858, 1 Am. St. R. 60.

for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional, sale. 'If, by the terms of the agreement, the purchaser became liable unconditionally for the purchase price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the registration statute, as its purpose is simply to retain a secret lien.'[1] . . . In

[1] Citing Hart v. Barney, etc. Mfg. Co., 7 Fed. R. 543.

In Aultman v. Silha (1893), 85 Wis. 359, 55 N. W. R. 711, it appeared that Silha had ordered from Aultman & Co. a threshing outfit for which he was to give his notes secured by a mortgage upon the machinery and also upon certain land; and the question arose whether there was a conditional sale or a sale absolute with a mortgage back for security. Said the court: "Where this question is at all doubtful the courts are inclined to hold the transaction a mortgage. The real nature of the transactions, as disclosed by the written documents and all the surrounding circumstances, is sought to be ascertained. Rockwell v. Humphrey, 57 Wis. 410. The courts do not favor a conditional sale. In viewing this transaction, and ascertaining its legal effect, all the contemporaneous documents executed between the parties are to be considered. There is, *first*, the order, which plainly contemplates an absolute sale and expressly provides for the execution of a first mortgage on the machinery; *second*, the notes, which contain a provision that the title of the machinery shall not pass until the notes are paid in full, but which also contain a clause authorizing sale of the property and application of the proceeds on the notes, which clause is inappropriate to anything but a mortgage: *third*, the chattel mortgage, which expressly recognizes and asserts and warrants that the title of the machinery is in Silha, and contains elaborate and full provisions for foreclosure and sale in case of default, and covenants that, in case the proceeds of the sale are insufficient to pay the debt, *Silha will pay the deficiency; fourth*, the real-estate mortgage. Consideration of all of these documents forces our minds to the conclusion that the transaction is an absolute sale with mortgage back. The stipulations and agreements which indicate this intent are numerous, while there is only one which points to a conditional sale, and that is coupled with a provision only suitable to a chattel mortgage. The acts and conduct of the parties also point to the same conclusion. The giving of mortgages upon the machinery and other property to secure the pay-

terms the notes executed by Smith to the intervenors made him an absolute debtor for the price of the furniture, and the stipulation therein that 'A. H. Andrews & Co., or their assigns, shall have the right to assume possession at any time they may deem themselves insecure, and, after maturity, to sell said property and apply the proceeds of such sale, over and above the expenses of taking and retaining possession thereof, on this note, and to collect the balance,' being manifestly for the purpose of enabling the intervenors to enforce such payment by subjecting the property to sale for that purpose, is an attempt to reserve a lien thereon to secure the payment of the purchase price." It was therefore held void as to third parties, "as being in contravention of our chattel-mortgage act."

ment of the notes, with stipulations to pay the balance remaining after foreclosure, is utterly inconsistent with the idea of a conditional sale. Silver Bow M. & M. Co. v. Lowry, 6 Mont. 288."

In Baldwin v. Crow (1888), 86 Ky. 679, 7 S. W. R. 146, it appeared that Baldwin & Co. had delivered to one Dennis a piano, and received from him three notes, each of which contained the following clause: "This note is of a series given for the purchase of the instrument mentioned below, the conditions of which purchase are, that said instrument remains the property of D. H. Baldwin & Co. until all notes given for the instrument are paid, and in default of payment of any of said notes at maturity, or at any time after such default, before accepting payment of amount thus due, or in case said instrument, before payment in full, is removed from Nicholasville, Kentucky, without written consent of D. H. Baldwin & Co., they may receive possession of said instrument without any liability on their part to refund any money previously paid on account of said purchase. Loss in case of fire to be borne by me, A. J. Dennis." *Held* to be an absolute sale and mortgage back, relying on Greer v. Church, 13 Bush (Ky.), 430 (cited in preceding section), and Barney & Smith Mfg. Co. v. Hart, 8 Ky. Law R. 223, 1 S. W. R. 414. Substantially similar also is Singer Mfg. Co. v. Smith, 40 S. C. 529, 19 S. E. R. 132.

In Damm v. Mason, 98 Mich. 237, 57 N. W. R. 123, it appeared that one Partrick was indebted to Mason, and, being desirous of securing him, gave to Mason a contract describing property already owned by Partrick, and in his possession, but declaring, as in a contract of conditional sale, that the title should remain in Mason until paid for. Damm was a subsequent mortgagee for Partrick. In a contest between Damm and Mason it was held that the contract given to Mason was merely a security. See also Findley v. Deal, 69 Ga. 359.

§ 579. ——. It is believed, however, that the doctrines here laid down are not in harmony with those generally prevailing elsewhere.[1]

§ 580. —— **The rule in Pennsylvania.**— The rule in Pennsylvania has been thought to be somewhat peculiar, and requires mention. Distinction is there made between a bailment with a power of purchase annexed, and a conditional sale. If goods are delivered to be used and returned, this is a bailment, and it continues such in Pennsylvania notwithstanding that there may be annexed to it a stipulation that if the bailee shall pay a designated price he shall become the owner, and otherwise shall pay for the use.[2] If, however, notwithstanding the form or the name of the agreement, it is not contemplated that the article shall be returned to the bailor, but that the bailee has bought it or is bound to buy it, though the title may be reserved by way of security, it is a conditional sale.[3]

§ 581. ——. Of a contract of the first kind it was said: "Properly speaking there was not a sale, but a contract to sell at a future day, and the delivery in the meantime was a loan subject to be turned into a sale by a compliance with certain conditions."[4] In a case of the latter kind: "It is true it was claimed to be a lease and the transaction a bailment, but it was

[1] See *post*, § 583.

[2] Clark v. Jack, 7 Watts, 375; Myers v. Harvey, 2 Pen. & W. 478, 23 Am. Dec. 60; Rowe v. Sharp, 51 Pa. St. 26; Chamberlain v. Smith, 44 Pa. St. 431; Henry v. Patterson, 57 Pa. St. 346; Becker v. Smith, 59 Pa. St. 469; Enlow v. Klein, 79 Pa. St. 488; Crist v. Kleber, 79 Pa. St. 290; Christie's Appeal, 85 Pa. St. 463; Edwards' Appeal, 105 Pa. St. 103; Dando v. Foulds, 105 Pa. St. 74; Brown v. Billington, 163 Pa. St. 76, 29 Atl. R. 904; Ditman v. Cottrell, 125 Pa. St. 606, 17 Atl. R. 504; Case v. L'Oeble, 84 Fed. R. 582.

[3] Stadtfeld v. Huntsman, 92 Pa. St. 53, 37 Am. R. 661; Farquhar v. McAlevy, 142 Pa. St. 233; Clow v. Woods, 5 S. & R. 275, 9 Am. Dec. 346; Babb v. Clemson, 10 S. & R. 419, 13 Am. Dec. 684; Martin v. Mathiot, 14 S. & R. 214, 16 Am. Dec. 491; Jenkins v. Eichelberger, 4 Watts, 121, 28 Am. Dec. 691; Rose v. Story, 1 Pa. St. 190, 44 Am. Dec. 121; Waldron v. Haupt, 2 P. F. Smith, 408; Haak v. Lindermann, 64 Pa. St. 499, 3 Am. R. 612; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. R. 690; Ott v. Sweatman, 166 Pa. St. 217, 31 Atl. R. 102; Peek v. Heim, 127 Pa. St. 500, 17 Atl. R. 984.

[4] Clark *v.* Jack, *supra*.

not even so in form. It lacked the essential feature of a bailment, viz.: a stipulation for a return of the property at the end of the term. . . . It is of the essence of a contract of bailment that the article shall be returned in its own or some altered form to the bailor, so that he may have his own again. . . . The agreement was clearly a conditional sale."[1]

§ 582. —— **Bailment and conditional sale distinguished.** There is, however, nothing peculiar in principle in this particular phase of the Pennsylvania cases. It is undoubted that there may be a mere bailment with a privilege of purchase annexed, and it would be so held in any State;[2] but a bailment coupled with an agreement to sell and purchase is held in Pennsylvania, as in other States, to be a conditional sale. Few of the States, however, go so far as Pennsylvania in determining the results of such contracts, in which respect, as will be seen,[3] the Pennsylvania doctrine is peculiar.

§ 583. —— **Conditional sale and chattel mortgage distinguished.**— Although some of the anomalous contracts which this kind of dealing has produced have been held to be chattel mortgages in effect,[4] there is a clear distinction to be drawn between either the conditional contract to sell or the conditional sale and the chattel mortgage, and this distinction has usually been recognized by the courts.[5] As is said in one case,[6]

[1] Farquhar v. McAlevy, *supra*. See also Morgan-Gardner Electric Co. v. Brown, 193 Pa. St. 351, 44 Atl. R. 459.

[2] See, for example, McCall v. Powell, 64 Ala. 254.

[3] See *post*, § 600, note.

[4] See *ante*, § 577; Heryford v. Davis, 102 U. S. 235; Greer v. Church, 13 Bush (Ky.), 430; Knittel v. Cushing, 57 Tex. 354, 44 Am. R. 598; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. R. 279, 6 Am. St. R. 889.

[5] Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; Wadleigh v. Buckingham, 80 Wis. 230, 49 N. W. R. 745; Nichols v. Ashton, 155 Mass. 205, 29 N. E. R. 519; Harkness v. Russell, 118 U. S. 663; Gilbert v. National Cash Reg. Co., 176 Ill. 288, 52 N. E. R. 22 [citing also Plummer v. Shirley, 16 Ind. 380; Sumner v. Woods, 52 Ala. 94; Bingham v. Vandergrift, 93 Ala. 283; Jowers v. Blandy, 58 Ga. 379; McComb v. Donald, 82 Va. 903; McGinnis v. Savage, 29 W. Va. 362; Vasser v. Buxton, 86 N. C. 335; Frick

[6] Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1110.

"it is very difficult to see how a contract for the sale of personal property, in which it is agreed that the title of the property shall remain in the vendor, and the possession in the vendee, until payment of the debt, can be called a mortgage

v. Hilliard, 95 N. C. 117; The Marina, 19 Fed. R. 760].

In Harkness v. Russell (1886), 118 U. S. 663, it is said: "The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale with a reservation of a lien or mortgage to secure the purchase-money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: 'The express condition of this transaction is such that the title . . . does not pass . . . until this note and interest shall have been paid in full.' If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of 'damages and rental for said machinery.' This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared to be their intention, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser."

In Nichols v. Ashton (1891), 155 Mass. 205, 29 N. E. R. 519, where goods were delivered to one Fred L. Stiff under a contract purporting to be a contract of conditional sale, but which, it was contended, amounted to a mortgage in legal effect, it was said: "As to whether the written contract discloses a mortgage from Stiff to the plaintiff, it purports, it is true, to bind Stiff to make the payments necessary to entitle him to the goods, but it declares that he has borrowed and received those goods, and provides in the most explicit way that the title shall not pass until the whole amount of the stipulated value shall have been paid, and that the plaintiffs also retain

by the most liberal construction. In a mortgage the title of the property is in the mortgagor as well as the possession. The mortgage is a mere incumbrance, and the mortgagor may sell and confer a good title subject to such incumbrance. The two contracts are entirely different in form and essentially so in substance."

§ 584. —— **The true theory.**— A satisfactory and harmonious rule in respect of these cases cannot be attained until agreement is had as to definitions. In the writer's judgment the term "conditional sale" is a misnomer as applied to this class of contracts. Still, notwithstanding differences as to names and some difference as to essential nature, the great weight of authority is to the effect that agreements of the kind now under consideration, by whatever name called, are contracts of sale subject to a condition precedent, namely, the payment of the price. In other words, they are conditional contracts to sell, and are most appropriately described as conditional contracts of sale, to distinguish them from the true conditional sale, which is a sale subject to a condition subsequent, though

the right to the immediate possession. It is impossible by construction of such a contract to turn the transaction between the parties into a sale passing the title to Stiff and a mortgage or pledge back by him. Such a result can be reached only by overturning the instrument, which declares that the title does not pass, and there is no warrant for overturning it. Blanchard v. Cooke, 144 Mass. 207, 221. If the plain effect of the English language needs confirmation by authority, it may be mentioned that contracts like the present are recognized as being what they purport to be by statutes. St. 1884, ch. 313; Pub. Stat., ch. 192, § 13. See also Carter v. Kingman, 103 Mass. 517; Benner v. Puffer, 114 Mass. 376; Chase v. Ingalls, 122 Mass. 381. The case which has gone farthest in another direction contains nothing inconsistent with our decision. Bailey v. Hervey, 135 Mass. 172. See McCarthy v. Henderson, 138 Mass. 310, 312."

In Smith v. De Vaughn, 82 Ga. 574, 9 S. E. R. 425, De Vaughn sold Smith a mule and took from him a note for the price, which note contained also the following language: "And to secure the payment of this note, I hereby mortgage and convey unto said payee, his heirs and assigns, the following described property, to wit: One dark mare-mule named Queen, about ten years old, for which this note is given in part. Said mule to remain the property of J. E. De Vaughn until paid for." *Held*, that this was a conditional bill of sale with reservation of title, and not a mortgage.

the shorter term, "conditional sale," seems to be so firmly fixed in our legal nomenclature that it is not likely to be abandoned.

§ 585. On conditional contract to sell, no title passes until performance.— Such being the nature of the contracts of the first class, namely, the conditional contracts to sell, it remains next to consider their effect, and especially the question of their effect upon the transfer of the title. Upon this point the conclusion, both in reason and authority, is clear that until full[1] payment of the price no title passes to the prospective purchaser, unless this condition precedent of payment is waived.[2]

In the case of the true conditional sale, however, that is, the sale upon condition subsequent, a present title passes, subject to be divested upon non-payment.

§ 586. —— Note not payment.— It is very common in these cases for the buyer to give his note or notes to the seller as part of the contract, to further evidence his agreement to pay the price; and such notes are often afterward taken to secure the payment of a deferred instalment of the price. Not infrequently the contract expressly provides that the title shall remain in the seller until all such notes are paid; but in the absence of such an express stipulation the usual rule would apply and the note would not be regarded as payment, so as to defeat the vendor's claim, in the absence of clear evidence of an intention so to treat it.[3]

§ 587. Nature of the interest acquired by vendee.— Although it is thus true that, in the case of the conditional con-

[1] *Entire* payment is the condition unless otherwise stipulated. Brown v. Haynes, 52 Me. 578.

[2] Seymour v. Farquhar, 93 Ala. 292; McIntosh v. Hill. 47 Ark. 363; McRea v. Merrifield, 48 Ark. 160; Simpson v. Shackleford, 49 Ark. 63; Cincinnati Safe Co. v. Kelly, 54 Ark. 476; Kohler v. Hayes, 41 Cal. 455; Briggs v. McEwen, 77 Iowa, 303, 42 N. W. R. 303; Singer Mfg. Co. v. Bullard, 62 N. H. 129; Campbell Printing Co. v. Walker, 114 N. Y. 7, 20 N. E. R. 625; Levan v. Wilten, 135 Pa. St. 61, 19 Atl. R. 945; McComb v. Donald, 82 Va. 903, 5 S. E. R. 558, and the many other cases classified and arranged under § 542 and following.

[3] Triplett v. Mansur & Tebbetts Implement Co. (1900), — Ark. —, 57 S. W. R. 261: Segrist v. Crabtree (1888), 131 U. S. 287.

tract to sell, the prospective purchaser acquires no present title to the goods, he does acquire a present interest, namely, a right to become the owner upon the performance of the conditions, and also such rights to possession in the interval as the contract expressly or impliedly gives him.

In the case of the conditional sale — that is, the sale upon condition subsequent,— as has been seen, the vendee acquires a defeasible present title.

§ 588. —— **Whether assignable or leviable.**— In either case the interest or title acquired, where no restrictions are imposed by the contract and no personal considerations are involved, is usually deemed to be an assignable one, and the party may sell, assign or mortgage whatever interest he has,[1] though an attempt to transfer a greater interest would ordinarily be regarded as a conversion, which would entitle the true owner to recover the goods.[2] It is not, however, in cases of the first

[1] Bailey v. Colby (1856), 34 N. H. 29, 66 Am. Dec. 752; Sargent v. Gile, 8 N. H. 325; Carpenter v. Scott, 13 R. I. 477. In this case the transaction, "though in form a lease, is regarded in law as a conditional sale. Goodell v. Fairbrother, 12 R. I. 233; Currier v. Knapp, 117 Mass. 324; Greer v. Church, 13 Bush (Ky.), 430, 433, 434. Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale. Day v. Bassett, 102 Mass. 445, 447; Crompton v. Pratt, 105 Mass. 255; Currier v. Knapp, 117 Mass. 324, 325, 326; Chase v. Ingalls, 122 Mass. 381, 382." Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475; Ames Iron Works v. Richardson, 55 Ark. 642, 18 S. W. R. 381; Sunny South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. R. 902; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. R. 719.

The buyer acquires a salable interest, but his right to sell may be restricted by the contract, and it may be made a condition that he shall not sell without the previous consent of the vendor. McRea v. Merrifield, 48 Ark. 160.

It may also be made a condition that the property shall not be removed from some place specified without the seller's consent. Johnston v. Whittemore, 27 Mich. 463; Whitney v. McConnell, 29 Mich. 12; Smith v. Lozo, 42 Mich. 6.

[2] See Bailey v. Colby, *supra;* Sargent v. Gile, *supra.*

class ordinarily regarded as an interest which can be taken and sold upon execution,[1] or sold for taxes.[2]

§ 589. —— Entitled to protection.— The interest acquired by the vendee is clearly one entitled to protection as against wrong-doers, and he may maintain the actions necessary for that purpose. As against a wrong-doer who has converted them, the vendee is entitled to recover the full value of the goods, and he may do this, it has been held, even though the vendor may also have demanded the goods from the wrong-doer.[3]

§ 590. —— Performance of condition inures to benefit of transferee.— Where a sale or transfer of the vendee's interest is permissible, a performance of the condition after such transfer, either by the original vendee or his transferee, is sufficient to vest the title in such vendee or his transferee without a further bill of sale or other act on the part of the vendor.[4]

[1] Sage v. Sleutz, 23 Ohio St. 1; Nichols v. Ashton, 155 Mass. 205; Crist v. Kleber, 79 Pa. St. 290; Enlow v. Klein, 79 Pa. St. 488; Marquette Mfg. Co. v. Jeffery, 49 Mich. 283; Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. R. 379, 9 L. R. A. 270; Thomas v. Parsons, 87 Me. 203, 32 Atl. R. 876; Brown v. Haynes, 52 Me. 578; Everett v. Hall, 67 Me. 497; Hirsch v. Steele. 10 Utah, 18, 36 Pac. R. 49; Keck v. State, 12 Ind. App. 119, 39 N. E. R. 899: Reed v. Starkey, 69 Vt. 200, 37 Atl. R. 297; Dodd v. Bowles, 3 Wash. Ter. 383, 19 Pac. R. 156; Miles v. Edsall, 7 Mont. 185, 14 Pac. R. 701; Vermont Marble Co. v. Brow, 109 Cal. 236, 41 Pac. R. 1031, 50 Am. St. R. 37; Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448. See *contra,* Fairbank v. Phelps, 22 Pick. (Mass.) 535; Newhall v. Kingsbury, 131 Mass. 445.

May attach to extent of vendee's payments. Hervey v. Dimond, 67 N. H. 342, 39 Atl. R. 331, 68 Am. St. R. 673; Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475. After default no leviable interest. Fields v. Williams, 91 Ala. 502, 8 S. R. 808; Jordan v. Wells, 104 Ala. 383, 16 S. R. 23.

[2] Enlow v. Klein, 79 Pa. St. 488; Hovey v. Gow, 81 Mich. 314, 45 N. W. R. 985.

[3] Harrington v. King, 121 Mass. 269. See also French v. Osmer, 67 Vt. 427, 32 Atl. R. 254, and Lord v. Buchanan, 69 Vt. 320, 37 Atl. R. 1048, 60 Am. St. R. 933.

[4] Carpenter v. Scott, 13 R. I. 477 (citing, as above, Day v. Bassett, 102 Mass. 445, 447; Crompton v. Pratt, 105 Mass. 255, 258; Currier v. Knapp, 117 Mass. 324-326; Chase v. Ingalls. 122 Mass. 381, 383); Beach's Appeal. 58 Conn. 464, 20 Atl. R. 475 (citing the above-mentioned Rhode Island and Massachusetts cases, and Fosdick v.

§ 591. Nature of the interest retained by the vendor.— It is the distinguishing characteristic of these conditional contracts to sell which are now under consideration that the seller retains the title until the price is paid. Although the vendee acquires an interest in the goods even before payment is due, which increases, in the case of instalment contracts, as successive payments are made upon the price, and although this interest, under the decisions or statutes of several States, is rapidly augmenting in character, it is still clear, unless all distinctions are to be lost sight of, that the legal title remains in the seller.

This legal title would draw after it the right of possession also, unless the seller has parted with that right during the time being, as stated in a following section. If the vendee has not the possession, and no other notice of his right exists, it is of course possible for the vendor who remains in possession to cut off the vendee's rights in the goods themselves by a transfer of them to a *bona fide* purchaser; but where the vendee has possession, or there is statutory or actual notice of his rights, the interest remaining in the seller must be such as is consistent with the rights of the vendee under the contract.

§ 592. —— May be sold, seized, etc., subject to contract.— Subject to the contract, therefore, the vendor may, before any default by the vendee, sell, mortgage or assign his remaining title,[1] or it may be seized and sold upon execution against him. The vendor may also maintain any action which can be based upon ownership alone.[2] After default, which usually, unless waived, operates to restore the vendor's right of possession, he

Schall, 99 U. S. 235; note to Miller v. Steen, 89 Am. Dec. 128); Ames Iron Works v. Richardson, 55 Ark. 642, 18 S. W. R. 381.

[1] Burnell v. Marvin, 44 Vt. 277; Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; Ross-Mehan Foundry Co. v. Ice Co., 72 Miss. 608. Everett v. Hall, 67 Me. 497, goes much further.

[2] In Smith v. Gufford, 36 Fla. 481, 18 S. R. 717, 51 Am. St. R. 37, where a horse, which was the subject of the conditional contract, had been killed by a railroad company, the court said that either the vendor or the vendee might sue. "The conditional vendee could have sued because of his special ownership, and the vendor had also the right of action because of his retained legal ownership: the recovery by one, however, being a bar to any further recovery by the other. Kent v. Buck, 45 Vt. 18; St.

may deal with the goods,[1] or bring actions,[2] in any manner permitted to one in whom title and the right to immediate possession are united.

§ 593. —— Vendor may assign his remaining interest and the conditional contract of sale together.— The vendor may also ordinarily transfer his interest in the property and in the conditional contract of sale together, so as to invest his assignee with all the rights and remedies which the contract confers.[3] He might not, however, without making the contract absolute, separate it into parts, as by an absolute transfer of notes given for the price, while he attempted to retain the title and the remedies in his own hand.[4]

Louis, etc. Ry. Co. v. Biggs, 50 Ark. 169, 6 S. W. R. 724; Harrington v. King, 121 Mass. 269."

In Lord v. Buchanan, 69 Vt. 320, 37 Atl. R. 1048, 60 Am. St. R. 933, a stove sold conditionally had been wrongfully taken from the vendee by a third person. The vendee sued the wrong-doer and recovered the full value and special damages. The vendor then sued the wrong-doer in trespass and trover, and claimed to be entitled to at least nominal damages; but it was held that his action could not be maintained, as both were for the same wrong — the unlawful taking. It was conceded, however, that, for an injury to the reversionary interest, a recovery by one having only a possessory interest for an injury to his interest would not be a bar.

[1] In Hubbard v. Bliss, 12 Allen (Mass.), 590, it is said that where personal property has been sold and conveyed on a condition which is afterwards broken by the purchaser, the original owner may, by a new sale, convey a valid title to a new purchaser without first taking actual manual possession of the property.

[2] Where, after default, the goods in the vendee's possession had been levied upon by his creditors, the court in Alabama said of an action of trespass by the vendor: "Having the general property, which drew to itself the constructive possession — the general property and right to immediate possession at the time of the levy,— plaintiff may maintain an action of trespass against defendants if they tortiously took the property from the possession of the vendee, who was in such case his mere bailee." Fields v. Williams, 91 Ala. 502, 8 S. R. 808.

Vendor may maintain an action on the case, for injury to the property, against a bailee of the vendee, after condition broken; and the fact that the bailee had settled with the vendee for such injury is immaterial. French v. Osmer, 67 Vt. 427, 32 Atl. R. 254. Compare Lord v. Buchanan, *supra*.

[3] Landigan v. Mayer (1898), 32 Oreg. 245, 51 Pac. R. 649, 67 Am. St. R. 521.

[4] Merchants' Bank v. Thomas (1887), 69 Tex. 237; Parlin, etc. Co. v. Harrell (1894), 8 Tex. Civ. App. 368, 27 S. W. R. 1087.

§ 594. The right of possession.— A conditional contract to sell carries with it, *proprio vigore*, no right to the possession of the property by the vendee before payment. Such a right, if it exists, must be conferred by some express or implied term of the agreement, and the contract will, therefore, be the source of the right and the measure and test of its continuance. A contract of this kind consists, consciously or unconsciously, of two parts, of which the first may exist without the second: 1. The agreement to sell and buy. 2. The agreement as to possession in the interval. The agreement to give the vendee possession need not be express; it may be implied from custom or the evident intention of the parties.[1] It may also be nothing more than a mere revocable license.

§ 595. ——. The vendee's right of possession may, therefore, be co-extensive with the duration of the contract, or it may be terminable while the contract in other respects remains in force. The continuance of the agreement to sell may, moreover, be based upon one condition, while the continuance of the right of possession may be based upon another.[2] As was said in a case[3] in California: "The person with whom such a contract is made has only such right to the possession of the property as the contract gives, and if the contract provides that the right of possession shall cease upon the failure to perform a specified condition, the owner may, upon the failure of the other party to perform the condition, resume the possession." Where, however, no other provision is made, the right of possession will usually be terminated by default in payment.[4]

[1] Thus in Richardson v. Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. R. 809, where the contract provided for the conditional sale of new machinery, and stipulated that the title should remain in the seller until fully paid for, and that upon default in any of the payments the seller might take such machinery into his possession, it was held that the title remained in the seller until full payment was made, but that he was not entitled to possession until default was made in payment.

[2] See Hegler v. Eddy, 53 Cal. 597; Tufts v. D'Arcambal, 85 Mich. 185, 24 Am. St. R. 79, 12 L. R. A. 446.

[3] Hegler v. Eddy, *supra*.

[4] Wiggins v. Snow, 89 Mich. 476, 50 N. W. R. 991; Ryan v. Wayson, 108 Mich. 519, 66 N. W. R. 370.

§ **596.** ——. If, on the other hand, the contract is deemed to be one of true conditional sale,— that is, a present sale subject to a condition subsequent,— then the right of possession until default passes as an incident to the ownership; it does not depend alone upon the contract, and cannot be defeated before the defeasance of the sale except by virtue of some express provision to that effect.[1]

§ **597. Condition good against creditors of vendee.**— The condition reserving title in the seller until the goods are paid for is, as has been already intimated, effective not only against the original vendee, but, unless some statute intervenes, it is operative also to preserve the right of the conditional vendor, if guilty of no laches, against levies and seizures by the creditors of the vendee and assignments of the goods for the benefit of his creditors.[2]

This is, moreover, true, even though the goods were delivered under the contract to the conditional purchaser, who obtained them for the express purpose of resale in his business,[3] or for the purpose of consuming them in their use;[4] since neither of these purposes furnishes any warrant for the appropriation of the goods by the buyer's creditors.

[1] See Newhall v. Kingsbury, 131 Mass. 445.

[2] Vermont Marble Co. v. Brow, 109 Cal. 236, 41 Pac. R. 1031, 50 Am. St. R. 37; Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448; Perkins v. Mettler, 126 Cal. 100, 58 Pac. R. 384; Keck v. State, 12 Ind. App. 119, 39 N. E. R. 899; Ellis v. Holland, 98 Ga. 154, 26 S. E. R. 735; Nichols v. Ashton, 155 Mass. 205; Brown v. Haynes, 52 Me. 578; Everett v. Hall, 67 Me. 497; Thomas v. Parsons, 87 Me. 203, 32 Atl. R. 876; Marquette Mfg. Co. v. Jeffery, 49 Mich. 283, 13 N. W. R. 592; Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. R. 379, 9 L. R. A. 270; Miles v. Edsall, 7 Mont. 185, 14 Pac. R. 701; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 Atl. R. 20; Hirsch v. Steele, 10 Utah, 18, 36 Pac. R. 49; Reed v. Starkey, 69 Vt. 200, 37 Atl. R. 297; Dodd v. Bowles, 3 Wash. Ter. 383, 19 Pac. R. 156. Such goods cannot be distrained for rent. Tufts v. Stone, 70 Miss. 54, 11 S. R. 792.

[3] Rogers v. Whitehouse, 71 Me. 222; Lewis v. McCabe, 49 Conn. 141, 44 Am. R. 217; New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. R. 266, 5 L. R. A. 300; Burbank v. Crooker, 7 Gray (Mass.), 158, 66 Am. Dec. 470; Dewes Brewery Co. v. Merritt, *supra*. But *contra*, see Ludden v. Hazen, 31 Barb. (N. Y.) 650; Bonesteel v. Flack, 41 Barb. 435; Powell v. Preston, 1 Hun (N. Y.), 513.

[4] Armington v. Houston, 38 Vt. 448.

§ 598. ——. The liability of the goods to the claims of the buyer's creditors has been enlarged in several States, as will be seen, by statute, as a penalty for not filing or recording the contract in pursuance of legislative enactment;[1] but, in the absence of such legislation, the rule is that already stated.

§ 599. Condition good even against bona fide purchasers.— It is thus clear, as has been seen, that the conditional contract of sale is effective to preserve the title of the vendor from the claims of the vendee's creditors.[2] It is also effective as against subsequent purchasers from the vendee with notice of the condition.[3] Whether it is also operative against *bona fide* purchasers from the vendee who have no notice of the condition has been the subject of much controversy; but it is now settled by the great weight of authority that, unless otherwise declared by statute, such *bona fide* purchaser acquires no better title than his vendor had. Such has been the holding in Alabama,[4] Arkansas,[5] California,[6] Connecticut,[7] Delaware,[8] Florida,[9] Georgia,[10]

[1] These statutes are more fully referred to in a later section; but see National Cash Reg. Co. v. Broeksmit, 103 Iowa, 271, 72 N. W. R. 526; Peterson v. Tufts, 34 Neb. 8, 51 N. W. R. 297.

[2] See *ante*, § 588.

[3] First Nat. Bank v. Tufts, 53 Kan. 710, 37 Pac. R. 127; Rhode Island Loco. Works v. Lumber Co., 91 Ga. 639, 17 S. E. R. 1012; Batchelder v. Sanborn, 66 N. H. 192, 22 Atl. R. 535.

[4] Sumner v. Woods, 67 Ala. 139, 42 Am. R. 104 (overruling Sumner v. Woods, 52 Ala. 94, and Dudley v. Abner, 52 Ala. 572); Weinstein v. Freyer, 93 Ala. 257, 9 S. R. 285, 12 L. R. A. 700; Fairbanks v. Eureka Co., 67 Ala. 109, 42 Am. R. 105, n.; Ensley Lumber Co. v. Lewis, 121 Ala. 94, 25 S. R. 729. See also Tanner Engine Co. v. Hall, 89 Ala. 628, 7 S. R. 187; Seymour v. Farquhar, 93 Ala. 292, 8 S. R. 466. Are now required to be recorded.

[5] McIntosh v. Hill, 47 Ark. 363, 1 S. W. R. 680; McRae v. Merrifield, 48 Ark. 160, 2 S. W. R. 780; Simpson v. Shackleford, 49 Ark. 63, 4 S. W. R. 165; Triplett v. Mansur, etc. Co., — Ark. —, 57 S. W. R. 261.

[6] Houser-Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 59 Pac. R. 947; Palmer v. Howard, 72 Cal. 293, 1 Am. St. R. 60; Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448.

[7] See Lewis v. McCabe, 49 Conn. 141, 44 Am. R. 217; Hart v. Carpenter, 24 Conn. 427; Tomlinson v. Roberts, 25 Conn. 477; Cragin v. Coe, 29 Conn. 51; Hughes v. Kelly, 40 Conn. 148; Brown v. Fitch, 43 Conn. 512.

[8] Mathews v. Smith, 8 Houst. 22, 31 Atl. R. 879.

[9] Campbell Press Co. v. Walker, 32 Fla. 412; Roof v. Pulley Co., 36 Fla. 284, 18 S. R. 597. But see Hudnall v. Paine, 39 Fla. 67, 21 S. R. 791.

[10] Sims v. James, 62 Ga. 260. Now changed by statute.

Indiana,[1] Iowa,[2] Kansas,[3] Maine,[4] Massachusetts,[5] Michigan,[6] Missouri,[7] Mississippi,[8] Montana,[9] Nebraska,[10] New Hampshire,[11]

[1] Baals v. Stewart, 109 Ind. 371, 9 N. E. R. 403, citing many cases; Hodson v. Warner, 60 Ind. 214; Dunbar v. Rawles, 28 Ind. 225, 92 Am. Dec. 311.

[2] Baker v. Hall, 15 Iowa, 277; Robinson v. Chapline, 9 Iowa, 91; Bailey v. Harris, 8 Iowa, 331, 74 Am. Dec. 312. Now changed by statute requiring contracts to be in writing and recorded. Code 1873, § 1922. See, as to the construction and application of the statute, Pash v. Weston, 52 Iowa, 675, 3 N. W. R. 713; Moseley v. Shattuck, 43 Iowa, 540; Knoulton v. Redenbaugh, 40 Iowa, 114; Budlong v. Cottrell, 64 Iowa, 234, 20 N. W. R. 166 (distinguishing Singer Sew. M. Co. v. Holcomb, 40 Iowa, 33); Wright v. Barnard, 89 Iowa, 166, 56 N. W. R. 424.

[3] Sumner v. McFarlan, 15 Kan. 600. Now changed by statute. See Moline Plow Co. v. Witham, 52 Kan. 185, 34 Pac. R. 751.

[4] Brown v. Haynes, 52 Me. 578; Whipple v. Gilpatrick, 19 Me. 427. Now changed by statute. See Hill v. Nutter, 82 Me. 199, 19 Atl. R. 170; Hopkins v. Maxwell, 91 Me. 247, 39 Atl. R. 573.

[5] Coggill v. Hartford, etc. R. Co., 3 Gray (Mass.), 545; Sargent v. Metcalf, 5 Gray (Mass.), 306, 66 Am. Dec. 368; Hirschorn v. Canney, 98 Mass. 149; Blanchard v. Child, 7 Gray (Mass.), 155; Zuchtmann v. Roberts, 109 Mass. 53, 12 Am. R. 663; Benner v. Puffer, 114 Mass. 376; Wentworth v. Woods Mach. Co., 163 Mass. 28, 39 N. E. R. 414; Cottrell v. Carter, 173 Mass. 155, 53 N. E. R. 375.

[6] Couse v. Tregent, 11 Mich. 65; Dunlap v. Gleason, 16 Mich. 158; Fifield v. Elmer, 25 Mich. 48; Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. R. 159; Lansing Iron Works v. Wilbur, 111 Mich. 413, 69 N. W. R. 667; Pettyplace v. Groton Mfg. Co., 103 Mich. 155, note: Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. R. 379, 9 L. R. A. 270; Lansing Iron & Engine Works v. Walker, 91 Mich. 409, 51 N. W. R. 1061, 30 Am. St. R. 488; Gill v. De Armant, 90 Mich. 430, 51 N. W. R. 527; Marquette Mfg. Co. v. Jeffery, 49 Mich. 283, 13 N. W. R. 592.

[7] Ridgeway v. Kennedy, 52 Mo. 24; Little v. Page, 44 Mo. 412; Parmlee v. Catherwood, 36 Mo. 479; Robbins v. Phillips, 68 Mo. 100; Wangler v. Franklin, 70 Mo. 659. But now, by statute, the contract must be in writing and recorded. R. S. 1879, § 2507. See Collins v. Wilhoit, 108 Mo. 451, 18 S. W. R. 839; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. R. 67.

[8] Ketchum v. Brennan, 53 Miss. 596; Van Range Co. v. Allen (Miss.), 7 S. R. 499; Journey v. Priestley, 70 Miss. 584, 12 S. R. 799. But see Paine v. Hall Safe Co., 64 Miss. 175; Adams v. Berg, 67 Miss. 234, 7 S. R. 225; Jennings v. Wilson, 71 Miss. 42, 14 S. R. 259.

[9] Heinbockle v. Zugbaum, 5 Mont. 344, 5 Pac. R. 897, 51 Am. R. 59.

[10] Aultman v. Mallory, 5 Neb. 178, 25 Am. R. 478. Now changed by statute. See Osborne Co. v. Plano Mfg. Co., 51 Neb. 502, 70 N. W. R. 1124; Campbell Printing Press Co. v. Dyer, 46 Neb. 830, 65 N. W. R. 904.

[11] Weeks v. Pike, 60 N. H. 447; King v. Bates, 57 N. H. 446; Kimball v. Jackman, 42 N. H. 242. Now changed by statute.

New Jersey,[1] New Mexico,[2] New York,[3] North Carolina,[4] Ohio,[5] Oregon,[6] Rhode Island,[7] South Carolina,[8] Tennessee,[9] Texas,[10] Utah,[11] Vermont,[12] Virginia,[13] Washington,[14] and perhaps other States;[15] in Canada,[16] and the supreme court of the United States;[17] though since the decisions referred to, the rule in several of the States mentioned has been changed by statute.

§ 600. ——. In a few States, however, the decisions, based largely upon the theory of a condition subsequent or of con-

[1] Cole v. Berry, 42 N. J. L. 308, 36 Am. R. 511; Marvin Safe Co. v. Norton, 48 N. J. L. 410, 7 Atl. R. 418, 57 Am. R. 566. Now changed by statute. See Knowles Loom Works v. Vacher, 57 N. J. L. 490, 31 Atl. R. 306.

[2] Redewill v. Gillen, 4 N. Mex. 72, 12 Pac. R. 872. Such contracts are not within chattel mortgage recording acts. Maxwell v. Tufts, 8 N. Mex. 396, 45 Pac. R. 979.

[3] Ballard v. Burgett, 40 N. Y. 314; Austin v. Dye, 46 N. Y. 500; Comer v. Cunningham, 77 N. Y. 391, 33 Am. R. 626. Now changed by statute.

[4] Clayton v. Hester, 80 N. C. 275; Vassar v. Buxton, 86 N. C. 335. Now changed by statute requiring recording as to *bona fide* purchasers, though good as between the parties. Perry v. Young, 105 N. C. 463, 11 S. E. R. 511; Harrell v. Godwin, 102 N. C. 330, 8 S. E. R. 925; Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. R. 770.

[5] Sanders v. Keber, 28 Ohio St. 630; Call v. Seymour, 40 Ohio St. 670. Now regulated by statute. See Case Mfg. Co. v. Garven, 45 Ohio St. 289.

[6] Singer Mfg. Co. v. Graham, 8 Oreg. 17, 34 Am. R. 572.

[7] Apparently. See Goodell v. Fairbrother, 12 R. I. 233, 34 Am. R. 631. See also Carpenter v. Scott, 13 R. I. 477.

[8] Perhaps. See Herring v. Cannon, 21 S. C. 212, 53 Am. R. 661, referring to cases. The question was settled by statute in 1843, which rendered void all secret reservations of title to goods apparently sold and delivered.

[9] But now see Cowan v. Singer Mfg. Co., 92 Tenn. 376, 21 S. W. R. 663.

[10] Leath v. Uttley, 66 Tex. 82, 17 S. W. R. 401. Now changed by statute.

[11] Apparently. See Lippincott v. Rich (1900), — Utah, —, 61 Pac. R. 526.

[12] Now changed by statute. See Roberts v. Hunt, 61 Vt. 612, 17 Atl. R. 1006; Desany v. Thorp, 70 Vt. 31, 39 Atl. R. 309.

[13] McComb v. Donald, 82 Va. 903. Now changed by statute. See Hash v. Lore, 88 Va. 716, 14 S. E. R. 365; Callahan v. Young, 90 Va. 574, 19 S. E. R. 163; Arbuckle v. Gates, 95 Va. 802, 30 S. E. R. 496.

[14] Now regulated by statute. Johnston v. Wood, 19 Wash. St. 441, 53 Pac. R. 707.

[15] See Warner v. Roth, 2 Wyo. 63; Bunce v. McMahon, 6 Wyo. 24, 42 Pac. R. 23.

[16] Walker v. Hyman, 1 Ont. App. 345.

[17] See the exhaustive review of the cases in Harkness v. Russell, 118 U. S. 663.

structive fraud, protect the claims of the *bona fide* purchaser, without a statute.[1]

§ 601. —— Rule does not apply when goods bought to be resold.— But the rule permitting the conditional vendor to retake his goods in case of default, even from a *bona fide* purchaser from his conditional vendee, very obviously should not, and does not, apply in those cases in which the goods have been delivered to the conditional vendee for the very purpose of being resold to such a purchaser, as where a retail dealer obtains goods from a wholesale dealer upon the agreement that the title to the goods as a bulk shall remain in the latter, but the retail dealer is impliedly, if not expressly, permitted to sell from the bulk in the usual course of trade.[2] A sale of the

[1] In **Illinois** the *bona fide* purchaser is protected. See Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Michigan Central R. R. Co. v. Phillips, 60 Ill. 190; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499.

In **Colorado.** See Jones v. Clark, 20 Colo. 353, 38 Pac. R. 371; overruling George v. Tufts, 5 Colo. 162.

In **Kentucky** the *bona fide* purchaser is protected. See Vaughn v. Hopson, 10 Bush, 337; Greer v. Church, 13 Bush, 430. So in **Maryland.** See Hall v. Hinks, 21 Md. 406; Butler v. Gannon, 53 Md. 333; Central Trust Co. v. Arctic Mfg. Co., 77 Md. 202, 26 Atl. R. 493; Lincoln v. Quynn, 68 Md. 299, 11 Atl. R. 848, 6 Am. St. R. 446.

In **Pennsylvania**, it is said in Ryle v. Loom Works, 87 Fed. R. 976, it is the established rule "that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is ineffectual and void as respects the creditors of the vendee and innocent purchasers; and the rule applies whatever may be the form of the agreement. Haak v. Linderman, 64 Pa. St. 499; Stadtfeld v. Huntsman, 92 Pa. St. 53, 37 Am. R. 661; Thompson v. Paret, 94 Pa. St. 275; Brunswick, etc. Co. v. Hoover, 95 Pa. St. 508; Forrest v. Nelson, 108 Pa. St. 481; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. R. 690; Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. R. 811; Ott v. Sweatman, 166 Pa. St. 217, 31 Atl. R. 102. But where personal property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and purchasers. Rowe v. Sharp, 51 Pa. St. 26; Enlow v. Klein, 79 Pa. St. 488; Goss Printing Press Co. v. Jordan, 171 Pa. St. 474, 32 Atl. R. 1031."

[2] In Weston v. Brown (1899), 158 N. Y. 360, 53 N. E. R. 36, the agreement expressly declared that it

goods in bulk might be deemed unauthorized and pass no title, but the retail purchaser in the usual course of business would, where such resales were expressly or impliedly authorized, obtain a good title, though the retail dealer might fail in paying for the goods.[1]

should not be construed as restricting the vendee's right to sell to *bona fide* purchasers; but if so sold the proceeds should belong to the vendor until the purchase price was paid. As to these proceeds, the vendor may recover them from the vendee in an action at law, and need not go into equity for accounting.

[1] Rogers v. Whitehouse, 71 Me. 222; Winchester Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. R. 382; Burbank v. Crooker, 7 Gray (Mass.), 158, 66 Am. Dec. 470; New Haven Wire Co.'s Cases, 57 Conn. 352, 18 Atl. R. 266; Stone v. Waite, 88 Ala. 599; Leigh v. Railroad Co., 58 Ala. 165; Devlin v. O'Neill, 6 Daly (N. Y.), 305; Ludden v. Hazen, 31 Barb. (N. Y.) 650. Authority to sell at retail, as in the case of goods consigned, does not justify a sale at wholesale. Powell v. Wallace (1890), 44 Kan. 656, 25 Pac. R. 42; Romeo v. Martucci (1900), 72 Conn. 504, 45 Atl. R. 99, 47 L. R. A. 601. There is no right to sell again, though the conditional vendor knew that the conditional vendee was a dealer and had no use for the goods except for resale, if the contract expressly provides that the latter should not sell them till paid for, and a *bona fide* sub-vendee gets no title as against the original conditional vendor. Sargent v. Metcalf, 5 Gray (Mass.), 306, 66 Am. Dec. 368.

But in Poorman v. Witman, 49 Kan. 697, 31 Pac. R. 370, where a vendee, who was authorized to resell a quantity of flour, mortgaged it with the rest of his stock for pre-existing debts, and the mortgagees on foreclosure sold the whole stock, including this flour, to a third person, it was held that the latter obtained a good title.

In Columbus Buggy Co. v. Turley, 73 Miss. 529, 19 S. R. 232, 55 Am. St. R. 550, there was authority to resell, the proceeds to be held as agent for the vendor. The vendee sold the goods to one of his creditors in satisfaction of the latter's claim, the creditor having no knowledge of the original vendor's claim. *Held*, that the creditor obtained a good title.

Where the vendor has licensed the vendee to sell the property and account to him for the proceeds, a sham sale will not cut off his lien, but the sub-vendee is not bound to see that the proceeds are actually paid to the original vendor (Ufford v. Winchester, 69 Vt. 542, 38 Atl. R. 239), unless that is one of the conditions of the license. White v. Langdon, 30 Vt. 599.

Permission to sell at retail does not make the goods subject to seizure by the vendee's creditors. Mack v. Story, 57 Conn. 407, 18 Atl. R. 707. And where the vendee is authorized to resell "in the due course of trade," this does not justify him in turning out the goods in payment of antecedent indebtedness. Pratt v. Burhans, 84 Mich. 487, 47 N. W. R. 1064, 22 Am. St. R. 703.

§ **602.** ——. The same result may ensue from the operation of estoppel where the conditional vendor has previously permitted sales from the bulk under like circumstances.[1]

§ **603. Statutes requiring filing or recording of contract.** Unless so declared by statute, these contracts of conditional sale or the agreements evidencing them are not deemed to be chattel mortgages or instruments in the nature of chattel mortgages, so as to come within the provisions of the familiar statutes which require chattel mortgages to be filed or recorded.[2] In some States, however, they have been expressly made subject to such provisions, and in several States special statutes have been enacted with express reference to these contracts. These statutes usually provide that unless the contract, or some memorandum thereof,[3] be in writing, signed by the parties,[4] and filed or recorded,[5] after the manner of chattel mortgages,

[1] See Spooner v. Cummings, 151 Mass. 313, 23 N. E. R. 839. See also Ezzard v. Frick, 76 Ga. 512.

[2] See McComb v. Donald, 82 Va. 903; Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; Campbell Print. Press Co. v. Walker, 22 Fla. 412, 1 S. R. 59; Rogers Locomotive Works v. Lewis, 4 Dill. 158; The Marina, 19 Fed. R. 760; Maxwell v. Tufts (New Mex.), 45 Pac. R. 979.

[3] As in Minnesota, where, if the contract was not in writing, a memorandum of it must be recorded.

[4] Must be signed by *both* parties in Wisconsin. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. R. 1082. But a signing by the factor of the vendor and also by the vendee suffices. Kellogg v. Costello, 93 Wis. 232, 67 N. W. R. 24.

[5] In **Connecticut** the statute of 1893 provided that such contracts should be in writing, acknowledged and recorded, or they would be regarded as absolute except as against the vendor or his heirs. See Lee Bros. Furn. Co. v. Cram, 63 Conn. 433, 28 Atl. R. 540.

In **Florida**, void after two years' possession unless in writing and recorded. Hudnall v. Paine, 39 Fla. 67, 21 S. R. 791.

In **Georgia**, except as between the parties, the contracts must be in writing and recorded like chattel mortgages. Cohen v. Candler, 79 Ga. 427, 7 S. E. R. 160; Gartrell v. Clay, 81 Ga. 327, 7 S. E. R. 161; Steen v. Harris, 81 Ga. 681, 8 S. E. R. 206; Mann v. Thompson, 86 Ga. 347, 12 S. E. R. 746, Morton v. Frick, 87 Ga. 230, 13 S. E. R. 463; Penland v. Cathey, 110 Ga. 431, 35 S. E. R. 659; Central Trust Co. v. Marietta, etc. Ry. Co., 48 Fed. R. 868, 1 C. C. A. 140, 2 U. S. App. 95.

Statute has no application to statutory "cash sales" of cotton under Code, § 1955*a*. Savannah Cotton Press v. MacIntyre, 92 Ga. 166, 17 S. E. R. 1023.

Contract is valid if recorded before adverse rights accrue (Holland v. Ad-

in some designated office, it shall not be valid as against subsequent purchasers from the vendee, or often as against his creditors.

While there is general likeness in form and similarity of purpose, these statutes yet vary so greatly that no brief *résumé* of them can be given in the text. They are so frequently also affected by local conditions and coloring that local knowledge is necessary. The substance of them, however, with a brief reference to certain of the more important cases which have construed them, will be given in the notes.

ams, 103 Ga. 610, 30 S. E. R. 432), and actual notice of it, though not recorded, makes it operative. Rhode Island Locomotive Works v. Empire Lumber Co., 91 Ga. 639, 17 S. E. R. 1012. The contract is good as against a subsequent unrecorded mortgage under Code, § 1957. Cottrell v. Merchants' Bank, 89 Ga. 508, 15 S. E. R. 944.

But if not entitled to record the actual record of the contract does not avail (Derrick v. Pierce, 94 Ga. 466, 19 S. E. R. 246), and such a contract not reduced to writing, and not recorded until after a delivery of the property and until after rights of creditors have attached, cannot avail. Harp v. Guano Co., 99 Ga. 752, 27 S. E. R. 181; Wood v. Evans, 98 Ga. 454, 25 S. E. R. 559.

In **Illinois** the contract, though not recorded, is good as against the buyer's assignee for creditors, as he takes the property subject to all equities, etc., which existed against the goods in the hands of his assignor. Hooven, etc. Co. v. Burdette, 153 Ill. 672, 39 N. E. R. 1107.

In **Iowa** such a contract is invalid as against creditor or purchaser without notice of the vendee in actual possession, unless it be in writing, executed by the vendor and acknowledged and recorded same as chattel mortgages. Wright v. Barnard, 89 Iowa, 166, 56 N. W. R. 424; Wilcox v. Williamson Co., 92 Iowa, 215, 60 N. W. R. 618. Agreement to pay or return is within this statute. Wright v. Barnard, *supra*.

Where the contract is not executed or recorded until two months after actual delivery, and is then the act of seller alone, it is not enough. Pash v. Weston, 52 Iowa, 675, 3 N. W. R. 713.

Statute does not apply where the contract is not one of conditional sale (Budlong v. Cottrell, 64 Iowa, 234, 20 N. W. R. 166), neither does it apply before the goods come into the actual possession of the vendee. Warner v. Johnson, 65 Iowa, 126, 21 N. W. R. 483. As to what constitutes actual possession, see Vorse v. Loomis, 86 Iowa, 522, 53 N. W. R. 314.

Contract is operative, though not recorded, as against a prior chattel mortgagee who claims the goods as after-acquired goods under his mortgage. Manhattan Trust Co. v. Sioux City Cable Co., 76 Fed. R. 658; Myer v. Western Car Co., 102 U. S. 1.

Where the original vendee sold to one who had notice of an unrecorded contract, and the latter sold to one who had no notice and who paid

§ 604. ——. As between the parties themselves, however, the contract is usually not affected by the lack of such recording

value, it was held that the last purchaser was protected. National Cash Reg. Co. v. Maloney, 95 Iowa, 573, 64 N. W. R. 618.

It is not necessary that the contract shall be executed by the buyer. National Cash Reg. Co. v. Schwab, — Iowa, —, 82 N. W. R. 1011.

In **Kansas** such a contract is void as against purchasers without notice and creditors, unless in writing and recorded like chattel mortgages. Laws 1889, ch. 255, p. 1; Moline Plow Co. v. Witham, 52 Kan. 185, 34 Pac. R. 751.

Actual notice is equivalent to record. First Nat. Bank v. Tufts, 53 Kan. 710, 37 Pac. R. 127.

Statute does not apply to goods delivered for sale on commission merely. Renoe v. Western Milling Co., 53 Kan. 255, 36 Pac. R. 329.

In **Kentucky** these contracts are treated as mortgages and must be recorded as such. Welch v. National Cash Reg. Co. (1898), — Ky. —, 44 S. W. R. 124.

In **Maine**, "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid is valid, unless it is made and signed as part of the note; and no such agreement, although so made and signed, in a note for more than thirty dollars is valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property." Rev. Stat. 1883, ch. 111, § 5; Hill v. Nutter, 82 Me. 199, 19 Atl. R. 170; Holt v. Knowlton, 86 Me. 456, 29 Atl. R. 1113; Hopkins v. Maxwell, 91 Me. 247, 39 Atl. R. 573.

Other writing containing a promise to pay may be a "note" within the meaning of this statute. Nichols v. Ruggles, 76 Me. 25; Cunningham v. Trevitt, 82 Me. 145, 19 Atl. R. 110.

Statute does not apply where there is no agreement to buy and no note given. Thomas v. Parsons, 87 Me. 203, 32 Atl. R. 876. See also Morris v. Lynde, 73 Me. 88.

In **Minnesota** the contract is void as against the creditors of the vendee and subsequent purchasers and mortgagees in good faith, unless the contract, or a memorandum thereof, if it were oral, be filed.

Statute applies to an exchange of property where one party retains title to the thing parted with by him until certain conditions are satisfied. Kinney v. Cay, 39 Minn. 210, 39 N. W. R. 140.

Statute does not apply to a mere consignment. Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. R. 1147.

Contract is not void as to creditors for delay in filing unless in that interval they have attached the property (Clark v. Richards Lumber Co., 68 Minn. 282, 71 N. W. R. 389); but creditors who became such while contract kept off the files are protected. Id. And an assignee for creditors may enforce their rights. Thomas Mfg. Co. v. Drew, 69 Minn. 69, 71 N. W. R. 921.

In **Mississippi** such a contract is void as to creditors or purchasers of one remaining in possession for three years unless acknowledged and recorded. Code, § 4227; Paine v. Hall Safe Co., 64 Miss. 175; Jennings v. Wilson, 71 Miss. 42, 14 S. R. 259.

Section 1300 does not apply except

or filing;[1] and, in general, it is likewise valid, though not recorded, as against mere creditors[2] or purchasers having otherwise actual knowledge of it.[3]

where the article is in possession of a trader with consent of owner. Adams v. Berg, 67 Miss. 234, 7 S. R. 225.

In **Missouri** such a contract, unless in writing, acknowledged by the vendee and recorded like a chattel mortgage, is void against creditors or subsequent purchasers in good faith. R. S. 1879, § 2505.

This means prior as well as subsequent creditors. Collins v. Wilhoit, 35 Mo. App. 585, 108 Mo. 451, 18 S. W. R. 839.

The statute applies to instalment contracts (Gentry v. Templeton, 47 Mo. App. 55), and to sale by one partner to another. Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. R. 67.

Bona fide purchasers protected where contract was not recorded. Eidson v. Hedger, 38 Mo. App. 52; Hauck Cloth Co. v. Brothers, 61 Mo. App. 381.

In **Nebraska** such a contract, unless in writing and recorded, is not valid as against purchasers or judgment creditors of a vendee in possession without notice. Com. Stat., ch. 32, § 26; Osborne Co. v. Plano Mfg. Co., 51 Neb. 502, 70 N. W. R. 1124; Norton v. Pilger, 30 Neb. 860, 47 N. W. R. 471; Peterson v. Tufts, 34 Neb. 8, 51 N. W. R. 297; Regier v. Craver, 54 Neb. 507, 74 N. W. R. 830.

A mortgagee of the conditional vendee is not a purchaser within this statute. McCormick Harvesting Co. v. Callen, 48 Neb. 849, 67 N. W. R. 863; Campbell Printing Press Co. v. Dyer, 46 Neb. 830, 65 N. W. R. 904.

In **New Hampshire** such a contract must be recorded to be valid against attaching creditors or subsequent purchasers without notice. Laws 1885, ch. 30: Gerrish v. Clark, 64 N. H. 492, 13 Atl. R. 870. See also Sinclair v. Wheeler, 69 N. H. 538, 45 Atl. R. 1085.

Actual notice is enough though not recorded. Batchelder v. Sanborn, 66 N. H. 192, 22 Atl. R. 535.

In **New Mexico** such contracts are not within the chattel mortgage recording acts. Maxwell v. Tufts (N. M.), 45 Pac. R. 979.

In **New Jersey**, unless recorded, such contracts are void as against subsequent purchasers and mortgagees in good faith. Stats. 1896, p. 891; Knowles Loom Works v. Vacher, 57 N. J. L. 490, 31 Atl. R. 306. But, though not so recorded, the contract is operative as against creditors.

[1] Compare provisions of statutes in preceding note. See also Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. R. 770; Brewing Ass'n v. Manufacturing Co., 81 Tex. 99: Hooven, etc. Co. v. Burdette, 153 Ill. 672, 39 N. E. R. 1107.

[2] Compare provisions of statutes in the second preceding note.

[3] See Morton v. Frick Co., 87 Ga. 230; Norton v. Pilger, 30 Neb. 860, 47 N. W. R. 471; McCormick v. Stevenson, 13 Neb. 70, 12 N. W. R. 828; Kelsey v. Kendall, 48 Vt. 24; Perkins v. Best, 94 Wis. 168, 68 N. W. R. 762; Singer Mfg. Co. v. Nash, 70 Vt. 434, 41 Atl. R. 429; Batchelder v. Sanborn, 66 N. H. 192, 22 Atl. R. 535: First Nat. Bank v. Tufts, 53 Kan. 710, 37 Pac. R. 127.

§ 605. Default by purchaser — What constitutes.— The most common purpose which the vendor has in view in retaining title is usually, as has been seen, to secure thereby the payment of the purchase price. Incident to this, however, or coupled

Wooley v. Wagon Co., 59 N. J. L. 278, 35 Atl. R. 789.

In **New York** such contracts are void as to subsequent purchasers and mortgagees in good faith unless filed. Laws 1884, ch. 315.

Creditors are not protected by this statute (Frank v. Batten, 49 Hun, 91); nor is a mortgagee for an antecedent debt (Duffus v. Furnace Co., 15 Misc. 169); nor a pledgee. Kauffman v. Klang, 16 Misc. 379.

In **North Carolina** the contract must be in writing and recorded like a chattel mortgage.

As between the parties the contract is not affected by the statute. Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. R. 770. See also Henkel v. Greene, 125 N. C. 489, 34 S. E. R. 554.

The statute does not operate retrospectively. Harrell v. Godwin, 102 N. C. 330, 8 S. E. R. 925; Perry v. Young, 105 N. C. 463, 11 S. E. R. 511.

Contract once properly recorded need not be rerecorded upon removal of property to another county. Barrington v. Skinner, 117 N. C. 47, 23 S. E. R. 90.

In **Ohio** the condition is void as to subsequent purchasers, mortgagees in good faith and creditors, unless it is in writing, and verified and filed as chattel mortgages are required to be. Act of May 4, 1885, 82 Ohio L. 238. The statute is constitutional. Weil v. State, 46 Ohio St. 450. For construction, see Speyer v. Baker, 59 Ohio St. 11, 51 N. E. R. 442; Metropolitan Trust Co. v. Columbus, S. R. Co., 93 Fed. R. 702.

In **South Carolina** such contracts are void as to subsequent creditors or purchasers for valuable consideration without notice unless recorded. Herring v. Cannon, 21 S. C. 212, 53 Am. R. 661; Southern Music House v. Dusenbury, 27 S. C. 464, 4 S. E. R. 60.

In **Texas** such contracts are void as to creditors and *bona fide* purchasers unless registered like chattel mortgages. Creditor here means a lien creditor. Parlin v. Harrell, 8 Tex. Civ. App. 368, 27 S. W. R. 1084. Valid as against assignee for creditors. Mansur, etc. Co. v. Beeman, etc. Co., — Tex. Civ. App. —, 45 S. W. R. 729. See also Bowen v. Lansing Wagon Works, 91 Tex. 385, 43 S. W. R. 872; Hall, etc. Co. v. Brown, 82 Tex. 469, 17 S. W. R. 715; San Antonio Brewing Ass'n v. Arctic Mfg. Co., 81 Tex. 99, 16 S. W. R. 797; Hoyt v. Weiss, 10 Tex. Civ. App. 462, 32 S. W. R. 86.

In **Vermont** contract must be recorded within thirty days to be valid against attaching creditors or subsequent purchasers without notice. Rev. L. 1880, § 1992; Desany v. Thorp, 70 Vt. 31, 39 Atl. R. 309; Whitcomb v. Woodworth, 54 Vt. 544; Church v. McLeod, 58 Vt. 541.

Attaching creditors, to be protected, must likewise be without notice. McPhail v. Gerry, 55 Vt. 174; Singer Mfg. Co. v. Nash, 70 Vt. 434, 41 Atl. R. 429.

Lien must be foreclosed by public sale by a public officer, and vendee has the right to redeem within a

with it, may be provisions that the property shall not be removed from a specified place,[1] or shall be used only for a certain purpose,[2] or shall be kept insured, or be kept up to a certain value, as in the case of a stock of goods,[3] or be preserved in good order, and the like.

In the formal contracts now so common, these matters will be found specifically provided for, with penalties attached for their breach, the usual penalty being the resumption of possession by the seller, and perhaps the total termination of the contract.

The default, however, which is most frequently presented is

time prescribed. Act 1884, No. 93; Roberts v. Hunt, 61 Vt. 612, 17 Atl. R. 1006.

In **Virginia** contract must be recorded or it will be void as to creditors and *bona fide* purchasers. Code, § 2462; Hash v. Lore, 88 Va. 716, 14 S. E. R. 365; Callahan v. Young, 90 Va. 574, 19 S. E. R. 163; Arbuckle v. Gates, 95 Va. 802, 30 S. E. R. 496.

In **Washington** the sale is absolute as to all creditors or purchasers in good faith unless filed within ten days. Bal. Code, § 4585. As to what is a conditional sale hereunder, see Eisenberg v. Nichols, 22 Wash. 70, 60 Pac. R. 124.

Purchaser in consideration of a pre-existing debt is protected by this statute. Johnston v. Wood, 19 Wash. 441, 53 Pac. R. 707.

In **West Virginia**, unless recorded, the contract is void as to creditors and purchasers without notice. Baldwin v. Van Wagner, 33 W. Va. 293, 10 S. E. R. 716.

In **Wisconsin** contract must be subscribed by *both* parties, and filed in office of town clerk, in order to be valid against others than the parties and those having notice. Rawson Mfg. Co. v. Richards, 69 Wis. 643, 35 N. W. R. 40; Kellogg v. Costello, 93 Wis. 232, 67 N. W. R. 24.

As to signing by both parties, see Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. R. 1100; Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. R. 1082; Kellogg v. Costello, *supra*.

Assignee for creditors has the rights of such creditors. Sheldon Co. v. Mayers, *supra*. Notice by recitals in other instruments through which the party claims is sufficient. Perkins v. Best, 94 Wis. 168, 68 N. W. R. 762.

Contract for sale of standing timber is not within this statute. Bent v. Hoxie, 90 Wis. 625, 64 N. W. R. 426; Lillie v. Dunbar, 62 Wis. 198.

Statute requiring notice has no application where the vendee surreptitiously obtains possession before the contract is completed. Owen v. Long, 97 Wis. 78, 72 N. W. R. 364.

Statute does not protect a mere trespasser. Kimball v. Post, 44 Wis. 471.

[1] Johnston v. Whittemore, 27 Mich. 463; Whitney v. McConnell, 29 Mich. 12; Smith v. Lozo, 42 Mich. 6.

[2] Faisst v. Waldo, 57 Ark. 270, 21 S. W. R. 436.

[3] Ryan v. Wayson, 108 Mich. 519, 66 N. W. R. 370.

that of the failure of the vendee to pay for the goods at the time specified, or, if no time was agreed upon, then within a reasonable time;[1] and, whatever the condition, there will be a default whenever the buyer, without the consent of the seller, has failed or omitted to pay the price or do the other act at the time or in the manner agreed upon.[2]

§ 606. Effect of vendee's default.— It is customary and competent for the parties to stipulate, with more or less of particularity, what shall be the effect of the default by the vendee, and what shall be the respective rights and duties of the parties thereafter. The mere omission, however, of the vendee to pay the price, or perform the other acts agreed upon, at maturity, while it may terminate his right to possession[3] does not, unless by force of an express provision, *ipso facto* operate as an absolute forfeiture of all his rights, in the absence of a demand for such payment or performance, or a request for the restoration of the goods, on the part of the vendor;[4] and upon such a demand, even after maturity, the vendee may, it is held, still pay the amount or perform the other stipulated acts and save the goods.[5]

[1] Mathews v. McElroy, 79 Mo. 202; Wiggins v. Snow, 89 Mich. 476, 50 N. W. R. 991; Ryan v. Wayson, 108 Mich. 519, 66 N. W. R. 370.

[2] In Cincinnati Safe Co. v. Kelly, 54 Ark. 476, 16 S. W. R. 263, plaintiff sold Kelly a new safe for a sum of money and his old safe, which Kelly was to deliver at the depot. Kelly paid the money, but, though "urged" to do so, did not deliver the old safe at the depot, though it appeared afterward that he had requested permission of the station agent to place the safe on the depot platform, which was refused unless it was placed there for shipment. Kelly could give no shipping instructions and therefore did not deliver the safe at the depot. He did not, however, notify plaintiff of this reason or ask instructions, or notify it of his readiness to deliver. *Held*, that Kelly was in default.

[3] As to necessity of demand before retaking the goods, see *post*, § 628.

[4] Sunny South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. R. 902; Ames Iron Works v. Rea, 56 Ark. 450, 19 S. W. R. 1063; Nattin v. Riley, 54 Ark. 30, 14 S. W. R. 1100; Deyoe v. Jamison, 33 Mich. 94; Taylor v. Finley, 48 Vt. 78; Hutchings v. Munger, 41 N. Y. 155.

[5] Taylor v. Finley, Hutchins v. Munger, Nattin v. Riley, and other cases in preceding note; O'Rourke v. Hadcock, 114 N. Y. 541, 22 N. E. R. 33; Vaughn v. McFadyen, 110 Mich. 234, 68 N. W. R. 135.

If money is not paid at the time

§ 607. ——. The default of the vendee does, nevertheless, work a radical change in the relations of the parties. It puts the vendee in the position of one who, at least, has failed to improve an opportunity,—as where he was not absolutely bound to buy,—or who has violated his undertaking—as in the ordinary case where he has absolutely agreed to buy and pay for the chattel; and it gives to the vendor, unless he waives it, the right to avail himself of the remedies which the contract or the rules of law prescribe or offer.

§ 608. ——. Moreover, after the seller has exercised his right to terminate the buyer's interest, no new transfers of the buyer's former title can be made in such wise as to force new parties or new obligations upon the seller.[1]

§ 609. **Waiver of default by seller.**— The law has no interests of its own to subserve in insisting upon forfeitures or the other results of default. The remedies it gives are for the benefit of the vendor, and he may waive them if he will. He may do this, moreover, either expressly or by implication, and as the results of default more often work hardship to the buyer than to the seller, the law looks with complacence at least upon those acts of the vendor which may fairly be construed as indicative of his intention not to insist upon a forfeiture of the buyer's rights. If, therefore, the seller, notwithstanding the default, does not avail himself of his appropriate remedy, but so acts as to reasonably warrant the inference that he regards the buyer's rights as still subsisting, he will be deemed to have waived the default, and he will not be at liberty to declare a forfeiture until he has in some way put the buyer, whom he has thus misled, in the attitude of a fresh default.

§ 610. ——. Thus, if, after default, the seller permits the buyer to retain possession of the goods and accepts part pay-

specified, and the seller resumes possession, the buyer cannot maintain replevin by virtue of a subsequent tender of the price, if the tender is not kept good. Summerson v. Hicks, 134 Pa. St. 566, 19 Atl. R. 808.

[1] Lippincott v. Rich, 19 Utah, 140, 56 Pac. R. 806.

ments on the price;[1] or if, where the price is payable in instalments, the vendor permits the vendee to continue in possession and extends the time of payment of an instalment due;[2] or permits the vendee to make payments and retain possession after the whole amount is due,[3] — his conduct will be deemed to be a waiver of the default in question, and he can only insist upon a default and regain possession by making a fresh demand of payment or performance which is not complied with.[4]

§ 611. ——. It is not, however, to be understood that the seller is, at his peril, bound to act instantly, or to proceed with all possible dispatch or harshness: the question is whether his conduct can reasonably be viewed as indicating that he does not expect to insist upon a forfeiture, and thereby leading the vendee into a position of false security.[5]

§ 612. ——. Whether the vendor has so conducted himself as to establish a waiver is ordinarily a question of fact for the jury, in view of all the circumstances of the case.[6]

§ 613. **Remedies of seller upon default.**— The common and characteristic remedy of the seller, upon default, is to declare the buyer's rights under the contract forfeited and recover his goods. There may, however, be cases in which the right to the possession of the property is so far at the will of the conditional vendor, or is so far dependent upon other conditions than that of payment, that the vendor may resume

[1] Hutchings v. Munger, 41 N. Y. 155.

[2] Cole v. Hines, 81 Md. 476, 32 Atl. R. 196, 32 L. R. A. 455.

[3] O'Rourke v. Hadcock, 114 N. Y. 541, 22 N. E. R. 33; Mosby v. Goff, 21 R. I. 494, 44 Atl. R. 930; People's Furn. & Carp. Co. v. Crosby, 57 Neb. 282, 77 N. W. R. 658, 73 Am. St. R. 504; Taylor v. Finley, 48 Vt. 78; Fairbank v. Phelps, 22 Pick. (Mass.) 535.

[4] Hutchings v. Munger, Cole v. Hines, O'Rourke v. Hadcock, *supra;* Quinn v. Parke & Lacy Mach. Co., 5 Wash. 276. 31 Pac. R. 866.

[5] Delay of vendor is construed with much strictness in Delaware. Mathews v. Smith, 8 Houst. 22, 31 Atl. R. 879.

[6] Goslen v. Campbell, 88 Me. 450, 34 Atl. R. 265; Quimby v. Lowell, 89 Me. 547, 36 Atl. R. 902; Wing v. Thompson, 78 Wis. 256, 47 N. W. R. 606; Warnken v. Langdon Co., 8 N. Dak. 243, 77 N. W. R. 1000.

possession even before default in payment. There are also cases, as will be seen, in which the vendor may, by virtue of the peculiar provisions of the contract, resume possession of the goods and at the same time leave the general obligations of the contract unimpaired. When, however, by the express or implied conditions of the contract, the vendee is entitled to possession until default, his possession cannot, of course, be disturbed until he has made default,[1] though upon such default, unless waived, the seller may resume possession.[2]

§ **614.** ——. Recovery of possession, however, is not necessarily the only remedy of the seller. It *may* be his only remedy, as where, in the not uncommon case, the other party has not agreed to buy, but has merely the option to do so;[3] but in the ordinary case the buyer does agree to buy and pay for the chattel, in terms which are more or less absolute and unconditional; and where he has done so, the seller may have personal remedies in lieu of, or in addition to, his remedy against the goods.

§ **615. What choice of remedies is offered.**— Where, therefore, the vendee is, expressly or impliedly, entitled to the possession until default, the vendor, who would take advantage of a default, may often have a choice of remedies. Under varying circumstances, the following list is open to him:

1. He may treat the contract as rescinded, upon the default

[1] Newhall v. Kingsbury, 131 Mass. 445; Hurd v. Fleming, 34 Vt. 169; Lambert v. McCloud, 63 Cal. 162.

[2] Harmon v. Goetter, 87 Ala. 325, 6 S. R. 93; Richardson Drug Co. v. Teasdall, 52 Neb. 698, 72 N. W. R. 1028; Wiggins v. Snow, 89 Mich. 476, 50 N. W. R. 991; Ryan v. Wayson, 108 Mich. 519, 66 N. W. R. 370.

[3] Thus, in Loomis v. Bragg, 50 Conn. 228, 47 Am. R. 638; Hine v. Roberts, 48 Conn. 267, 40 Am. R. 170 (as see Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475), the vendee did not agree to buy or pay. If he *did* pay, he obtained the goods; if he did not pay, the vendor might recover them, and this was held to be the extent of his loss or liability. So in Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448.

When the contract is in form a lease, and the lessee gives his notes for instalments of rent to fall due, the lessor who reclaims the goods cannot recover on the notes falling due thereafter. Campbell Print. Press Co. v. Henkle, 19 D. C. 95.

of the buyer, and recover his goods. If he does this, he has no other remedy.

2. He may treat the contract as in force but broken by the vendee; he may retake and keep the goods as his own, and, if the contract imposed upon the buyer an absolute obligation to buy, he may recover of the buyer damages for the breach of his agreement to buy and pay for the goods. The measure of damages will ordinarily be the difference between the contract price and the market value of the goods at the time and place of default.

3. He may, if the contract contains an unconditional agreement on the part of the vendee to pay, waive a return of the goods, treat the contract as executed on his own part, and recover from the vendee the agreed price of the goods.

4. He may, in some cases, if the contract permits it, without rescinding or terminating the contract, resume possession of the goods, hold them subject to the contract, and then enforce performance by the vendee, who, upon such performance, will be entitled to restoration of the goods.

§ 616. **Election of remedy.**— The remedies of the vendor are usually regarded as alternative and not cumulative. He has his choice, but, having elected to pursue one remedy, he cannot, it is said, afterwards abandon that and try another.

§ 617. —— **Rescission.**— With respect of the first remedy suggested,— that of rescission,— it is clear that such a course defeats all further remedies under the contract. The vendor is not required, unless by reason of some express term of the contract, to go so far as to *rescind* the contract; he may ordinarily deem it simply *broken* by the vendee,[1] and may sue for damages for its breach. If, however, he does treat it as rescinded, he is neither entitled to the price nor to damages; for the right to either flows from the contract, and the rescission wipes out the contract from the beginning.

§ 618. —— **Recaption.**— If the vendor has not rescinded, he has usually his choice of the second or the third remedies open

[1] See Hayes v. Nashville (1897), 47 U. S. App. 713, 26 C. C. A. 59, 80 Fed. R. 641.

to him. He may treat the contract as broken by the vendee and may recover his property. If he does regain his property and keeps it as his own, he has lost simply the benefit of the bargain,— the profit he would have made,— and the diminished value of the goods from use or deterioration. This loss he may recover in an action, not for the price, but for damages for the breach of the contract.

§ 619. —— Personal action.— If the vendor prefers neither to rescind nor to retake the property, but to rely on the personal responsibility of the vendee, he may do that, and may bring an action to recover the price as such, whenever there was an express or implied agreement by the vendee to buy and pay for the goods.[1] But the price is not ordinarily payable unless the title has passed; hence if the vendor chooses this remedy he clearly indicates his election to treat the sale as perfected, and thereby bars either a subsequent rescission of the contract or a reclamation of the property —unless the contract expressly permits him this double remedy,— even though he may not succeed in his endeavor to collect the price.[2] Having thus elected

[1] Bailey v. Hervey, 135 Mass. 172; McRea v. Merrifield, 48 Ark. 160, 2 S. W. R. 780; Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475; Crompton v. Beach, 62 Conn. 25, 25 Atl. R. 446, 18 L. R. A. 187; Seanor v. McLaughlin, 165 Pa. St. 150, 30 Atl. R. 717; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. R. 435; Richards v. The Schreiber Co., 98 Iowa, 422, 67 N. W. R. 569; Johnson-Brinkman Co. v. Railway Co., 126 Mo. 344, 28 S. W. R. 870, 47 Am. St. R. 675.

A formal act of delivery or tender of the goods, or specific waiver of the right to reclaim them, is not a condition precedent to an action for the price. Smith v. Barber, 153 Ind. 322, 53 N. E. R. 1014.

[2] See *post*, as to waiver of right to retake property, § 624. In Bailey v. Hervey, 135 Mass. 172, it appeared that plaintiff Bailey entered into a contract with defendants Hervey & Co., which recited that plaintiff had "hired and received" from them certain goods for which he agreed to pay them certain sums of money as "rent" at stated times, and "the balance" at a certain rate per month "until paid;" that no title to the goods should vest in him until he had performed all the conditions of the agreement, upon performance of which the title should vest. Bailey further agreed in said contract "that if any default be made in the payment of the rent or any part thereof as above specified, or if any default be made in the performance of any of the agreements herein contained, my right to hold or retain said prop-

to affirm the sale and pass the title, the vendor loses all claim upon the goods, unless the contract specially provides otherwise, and no lien will be afterwards implied to secure the payment of the price.

erty or any part hereof shall wholly cease and determine" (62 Conn. 29). Bailey being subsequently in default, the sellers sued him for the price, and then reclaimed the goods, under the circumstances stated in the opinion. Bailey then brought this action for the conversion of the goods. The court said: "By the terms of the written agreement the plaintiff was bound at all events to pay to the defendants the full amount at which the goods were valued, and upon such payment the title was to vest in him. This payment, therefore, constitutes the agreed price of the goods, and it is a misnomer to call it rent. The defendants would have no right to exact payment in full of the money and also to reclaim the goods. When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might, at their option, either reclaim the goods as their own property, without any obligation to account for their proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price they would thereby affirm it as a sale. Two inconsistent courses being open to them they must elect which they would pursue; and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price. But, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. Under this state of things, the action was continued to a later term of court, and after the lapse of several months, and after the commencement of the second subsequent term of court, the defendants, without discontinuing their action, or giving any notice to Bailey of an intention to abandon that remedy, took possession of the goods; and, after this had been done, they proceeded in their action to judgment, and took out execution, upon which they collected a small sum from the trustee. They had thus made a decisive election to treat the transaction as a sale before reclaiming the goods; and, under such an election, the title passed to Bailey. Butler v. Hildreth, 5 Met. 49; Arnold v. Richmond Iron Works, 1 Gray, 434, 440; Heryford v. Davis, 102 U. S. 235, 246. For these reasons a majority of the court is of opinion that there must be judgment for the plaintiff."

In Crompton v. Beach, 62 Conn. 25, 25 Atl. R. 446, 36 Am. St. R. 323, 18 L. R. A. 187, property was delivered

§ 620. Does recovery of goods bar action for the price?—But, while it is thus generally true that an attempt to collect the price, as such, is deemed to be such an election of remedies as will bar a subsequent recaption of the goods, is the converse of the proposition true, and will a recaption of the goods bar a

which was to become the property of the vendee upon the payment of a certain price for which he gave his note. It was also agreed that upon default the vendor should "have the right at any time to resume possession of the machinery, and to enter the premises and remove the same as his own property; and if any portion of said note, or renewals thereof, shall remain unpaid when possession shall be so taken, . . . then the amount which may have been paid shall be for the use of said machinery while in possession of the party of the second part, *and said note shall then be canceled and given up.*" [Italics mine: F. R. M.] The buyer became insolvent and the seller first sued on the note and attached property, and afterwards made claim on the note against his estate and procured a dividend of twenty-five per cent. (See Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475.) The seller then sought to recover the property, but it was held that she had made an election of remedies by her efforts to recover the price and could therefore not recover the property.

In Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. R. 435, there was a contract for the sale of harvesting machinery for which the vendee gave his notes, and also agreed that if he made default the vendor might, at his option, without notice and with or without legal proceedings, take and retain the property, and all moneys paid by the vendee prior to such default should be compensation for the use of the machinery up to that time. The buyer died, in default, and the notes, without reference to the contract, were presented and allowed as claims against his estate. The seller afterwards sought to recover the machinery. It was held that the presentation and allowance of the claim was an election to pursue the personal remedy, and that the property could not be recovered. To like effect: Richards v. Schreiber, 98 Iowa, 422, 67 N. W. R. 569; Smith v. Gilmore, 7 D. C. App. 192.

Prosecuting a claim for the price to final judgment is an election. Smith v. Barber, 153 Ind. 322, 53 N. E. R. 1014.

An attempt, though unsuccessful, to establish a material-man's lien for the property is a waiver of the right to retake it. Hickman v. Richburg (1899), 122 Ala. 638, 26 S. R. 136.

Where the seller sues for the price and attaches or levies upon the property in question as the property of the vendee, he thereby treats the contract as absolute. Tanner Engine Co. v. Hall, 89 Ala. 628, 7 S. R. 187; Montgomery Iron Works v. Smith, 98 Ala. 644, 13 S. R. 525; Fuller v. Eames, 108 Ala. 464, 19 S. R. 366; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. R. 719.

But in Matthews v. Lucia, 55 Vt. 308, where the seller at first sued and attached the goods, and then discontinued the suit and took the goods

subsequent action for the price? The cases generally answer this question in the affirmative, though they often proceed upon different reasons and are not all capable of being reconciled. It is said in some of them that this is simply another case of election of remedies; that the vendor may either retake his goods or proceed for the price, and, if he does one of these things, he cannot afterwards do the other.[1] In other of the cases it is said that when the seller reclaims the property he destroys the consideration for which the promise to pay was given, and that therefore the promise is thenceforward *nudum pactum*.[2] In

under the contract, it was held that the action was not a conclusive election, citing Child v. Allen, 33 Vt. 476.

In Thomason v. Lewis, 103 Ala. 426, 15 S. R. 830, a suit on the notes to judgment, but the judgment not being paid, was held not to be a conclusive election which would bar the recovery of the property, where the contract was that the title was not to pass until the notes were paid in full; and the same ruling in a like case, where the rights of third persons had not intervened, was made in Campbell Printing Press Co. v. Rockaway Pub. Co., 56 N. J. L. 676, 29 Atl. R. 681.

In Fuller v. Byrne, 102 Mich. 461, 60 N. W. R. 980, the agreement was that the property should remain the seller's until the price "and any judgment rendered thereon is paid in full." *Held*, that the title did not pass until the judgment was paid. Kirkwood v. Hoxie, 95 Mich. 62, was cited.

In Mississippi the seller may sue upon the note and replevy property at the same time, but he can have but one satisfaction. McPherson v. Acme Lumber Co., 70 Miss. 649, 12 S. R. 857.

Where there was an absolute promise to pay, and the contract stipulated that nothing should "constitute a defense or offset or delay prompt payment of this note in full at maturity," it was held that though the vendor had reclaimed and resold the property and applied the proceeds on the note, he could sue on the note for the balance. Dederick v. Wolfe, 68 Miss. 500, 9 S. R. 350.

In Georgia a recovery of judgment and its part payment do not bar seller of right of action against the goods for the balance. Jones v. Snider, 99 Ga. 276, 25 S. E. R. 668; Bowen v. Frick, 75 Ga. 786.

A transfer to third persons, apart from the contract itself, of the notes given for the price, is an election to make the sale absolute. Merchants', etc. Bank v. Thomas, 69 Tex. 237; Parlin v. Harrell, 8 Tex. Civ. App. 368, 27 S. W. R. 1087.

[1] Thus in Dowdell v. Empire Furn. Co., 84 Ala. 316, it is said that a claim upon the purchase price after the property has been retaken is an antagonistic position which cannot be maintained.

[2] So held in Minnesota. Aultman v. Olson, 43 Minn. 409, 45 N. W. R. 852, following Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. R. 597, and distinguishing Third Nat. Bank v. Armstrong, 25 Minn. 530. See

still other cases it is held that, however it may be in name, the reclamation of the property is, in fact, a rescission of the contract, upon which thereafter no action can be maintained.[1] In other cases still, although these proceed upon a different and

also Perkins v. Grobben, 116 Mich. 172, 74 N. W. R. 469, 39 L. R. A. 815, 72 Am. St. R. 512.

[1] Thus in Seanor v. McLaughlin, 165 Pa. St. 150, 30 Atl. R. 717, 32 L. R. A. 467, it appeared that, under a contract in form a lease, articles had been delivered which the lessee might buy, and, if he did, all rent paid was to apply on the purchase price. He covenanted to pay the "rent" and gave a judgment bond as collateral. It was also stipulated that in case of default the property was to be returned. The "lessee" paid one instalment, but then defaulted, and the "lessors" retook the property, refusing to surrender the bond. They then caused judgment to be entered against the "lessee" on the judgment bond, and the action was to determine the validity of that judgment. The court said that the lessors had two remedies or securities. They had reserved the title, and they had the judgment bond. "Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative; they could not adopt both, unless it was plainly expressed in the contract or a necessary implication from its terms. The words of this contract negative such a construction. The defendant stipulates that 'if default be made . . . I hereby covenant and agree to return said machines . . . and they or their agent may resume actual possession of the same.' That was the penalty for default on the primary obligation, and repossession of the machines the discharge of it. On default of payment the plaintiffs were not bound to accept the machine or take possession of it; they could have entered judgment on the bond, levied on the machine and any other property of the defendant in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation, to which the bond was collateral, no longer existed. It ought to have been surrendered to defendant when he demanded it at the time plaintiffs took away the machine.

"The contract in this case is not essentially different from those in Campbell v. Hickok, 140 Pa. St. 290, and Scott v. Hough, 151 Pa. St. 630, in both of which cases we held that the remedies were distinct and not cumulative. If the bailor rescinded by repossessing himself of the property, the right of personal action against the bailee was at an end. That the words 'rescission' or 'rescind' do not occur in this contract is not material. Rescission is a fact; the word itself may be used by the contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties which shall constitute the fact of rescission.

"The decision in Campbell v.

wholly tenable theory, it has been held that the contract imposed upon the buyer no obligation to buy and pay, but simply gave him an option to do so; and if he did not pay, the seller's only remedy was to reclaim the goods.[1]

§ 621. ——. But does it necessarily follow that a recovery of the property destroys the consideration for the contract, or in

Hickok. *supra*, was based on the stipulation of the contract that the lessor had the right, on lessee's failure to pay any instalment, to repossess himself of the property, and, having exercised this right, the contract was rescinded in fact, and there was an end of personal obligation on part of lessee. While the word 'rescinded' is used in that contract, the right to rescind and the act necessary to a rescission are plainly expressed without it, and the interpretation was fully warranted even if the word had not been used.

"Here the plaintiffs, in effect, in their contract, stipulated that on default of payment of rental they should have the right to take the machine back to make good the default; there was default, and because of it they took back the machine. This was both a right to rescind and the exercise of the right, or a rescission in fact." (But see Durr v. Replogle, 167 Pa. St. 347.)

Seanor v. McLaughlin is cited and followed in Perkins v. Grobben, 116 Mich. 172, 74 N. W. R. 469, 39 L. R. A. 815, where it is said: "The contract provides for two way of enforcing it. The plaintiff might sue on the note and retain the property [title] until the judgment was paid, or might retake the property, and treat the payments up to that time made as payments for the use, wear and tear of the machinery, but he cannot do both. The plaintiff has taken possession of the property as the owner thereof. What have the defendants had as the consideration of the note? They acquired no title or interest in the property, and could not until they paid the notes. They could not call the plaintiff to account for a disposition of the property, if he has made any, because they had no interest whatever in it, having made default in the payment of the notes, the vendor having exercised his right under the contract to take possession. The defendants have simply had for the notes the use of the property, and for that use they have paid the $800, which the contract gives the vendor the right to so apply. The vendor is not entitled to the title and possession of the property, and to be paid for it also."

Where the vendor reclaims the property and then sells it as his own, or otherwise appropriates the same to his own use, he does, in effect, rescind the contract, and he cannot afterwards recover the price. Tufts v. Brace (1899), 103 Wis. 341, 79 N. W. R. 414. See also Glisson v. Heggie (1898), 105 Ga. 30, 31 S. E. R. 118.

[1] Hine v. Roberts, 48 Conn. 267, 40 Am. R. 170; Loomis v. Bragg, 50 Conn. 228, 47 Am. R. 638; Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475; Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448.

effect rescinds it? As has been seen before, these agreements may usually be separated into two parts — an executory agreement to sell, and a bailment of the property. Either of these is a valid contract and may stand alone. May not the latter be withdrawn without necessarily defeating the former? Clearly it may be by express terms of the contract; but without express provisions to that effect, may not the contract be so interpreted as to permit of this result? This must depend upon the contract. If by a fair interpretation of the contract the seller may, upon default in payment or otherwise, have a right to resume possession, may he not do so without rescinding, but holding the property still subject to the contract, ready to be restored if payment is made?

§ 622. ——. In such a case[1] as this the court said: "The contract provides expressly that the title to the property shall continue to remain in plaintiff until the apparatus is paid for, and that, in case of the non-payment of either of the notes at maturity, the plaintiff shall have the right to take possession of the property; but it contains no provision that such act shall operate as a rescission of the contract or a forfeiture of the payments thereon. The reduction of the property to possession by the plaintiff does not excuse performance by defendant, as defendant has the right, upon payment of the amount due, to a return of the property. Plaintiff had the right, under the express conditions of the contract, to secure himself by taking possession, and the exercise of this right under the contract did not entitle the defendant to rescind the contract, or to a recovery of the amount paid, or to a delivery to him of the unpaid notes; neither did it give him any lien upon the property for the amount paid by him."

§ 623. ——. And where the contract provided that the seller, if he should deem himself insecure, might take possession of the property, even before the debt was due, and might sell the

[1] Tufts v. D'Arcambal, 85 Mich. 185, 48 N. W. R. 497, 24 Am. St. R. 79, 12 L. R. A. 446. See also Latham v. Sumner, 89 Ill. 233, 31 Am. R. 79.

property at public or private sale, and, after applying the net proceeds upon the debt, recover the unpaid balance, it was held that this was a valid and binding contract by which the parties must abide.[1]

§ 624. —— Waiver by vendor of right to retake property. The conditional vendor may not only elect some other remedy, but he may also, by his conduct, waive or lose his right to retake the goods in case of default, both as against the conditional purchaser and those who succeed to his rights, and thus be remitted to his remedy against the person merely.[2]

This question of waiver has been already touched upon,[3] and no general rule can be laid down in reference to it, other than that a waiver may be inferred wherever the conduct of the conditional vendor is inconsistent with the idea that he still expects to enforce a return of the goods if the conditions be not performed.[4] Whether such is the case or not is a question of fact for the jury.[5]

[1] McCormick Harv. Mach. Co. v. Koch (1899), 8 Okl. 374, 58 Pac. R. 626. To the same effect: Dederick v. Wolfe (1891), 68 Miss. 500, 9 S. R. 350.

[2] Robbins v. Phillips, 68 Mo. 100.

[3] See *ante*, § 609.

[4] A vendor of personal property who reserves title until the purchase price is paid does not waive his right to retake the property on default by advising a creditor of the vendee with knowledge of the reservation to take a mortgage upon the property. Ames Iron Works v. Richardson, 55 Ark. 642, 18 S. W. R. 381. Taking a note for an instalment due, the note being unpaid, is not a waiver of the right to retake. Levan v. Wilten, 135 Pa. St. 61, 19 Atl. R. 945. The fact that the vendee is permitted to manufacture into goods materials sold conditionally, and to sell the goods upon the express agreement that the proceeds shall be applied upon the price, is not a waiver. Prentiss Tool Co. v. Schirmer, 136 N. Y. 305, 32 N. E. R. 849. Taking a chattel mortgage upon other property is not a waiver. Montgomery Iron Works v. Smith, 98 Ala. 644, 13 S. R. 525; Cherry v. Arthur, 5 Wash. 787, 32 Pac. R. 744; Pettyplace v. Manufacturing Co., 103 Mich. 155, 61 N. W. R. 266.

Taking and foreclosing a mortgage on the property itself is a waiver (Hinchman v. Point Defiance Ry. Co., 14 Wash. 349, 44 Pac. R. 867), but not

[5] Goslen v. Campbell, 88 Me. 450, 34 Atl. R. 265; Quimby v. Lowell, 89 Me. 547, 36 Atl. R. 902; Peabody v. Maguire, 79 Me. 572, 12 Atl. R. 630; Wing v. Thompson, 78 Wis. 256, 47 N. W. R. 606; Page v. Edwards, 64 Vt. 124, 23 Atl. R. 917.

§ 625. Vendee has usually no election.— The choice of courses of conduct in these cases is usually the privilege of the seller only. Contracts may undoubtedly be so framed as to give to the conditional purchaser the option either to return the goods and be released from his obligation to pay for them, or to keep and pay for them, and such a construction has been put upon contracts in a few cases,[1] although other courts upon the same contracts would probably have reached different conclusions. In the great majority of cases, however, the obligation of the conditional purchaser to buy and pay for the goods is a fixed and absolute one, from which he cannot relieve himself by tendering back the goods.[2] And, on the other hand, the vendor's right of election, considered in the preceding sections, does not arise until the vendee is in default; up to that time the obligation of the former to sell is usually as absolute and irrevocable as that of the latter to buy.

§ 626. Vendor's right to take possession upon default — Entry upon premises — License.— It is customary, in con-

where the property is then redelivered to the vendee under the original contract (Goodkind v. Gilliam, 19 Mont. 385, 48 Pac. R. 548), nor where the mortgage is taken on this and other property as further security, with no intention of waiving the condition. Page v. Edwards, 64 Vt. 124. Endeavoring, though without success, to establish a material-man's lien for the price, is a waiver. Hickman v. Richburg (1899), 122 Ala. 638, 26 S. R. 136.

But where the vendor knows that logs contracted to be sold conditionally are being removed to the vendee's mill, sawed into lumber and sold to third persons for removal by them, and does not object, there is evidence of waiver to go to the jury. Wing v. Thompson, 78 Wis. 256. And so where the vendor, through his agents, permitted the vendee to appear to be the unconditional owner and to sell the goods as such (Foster v. Warner, 49 Mich. 641, 14 N. W. R. 673), and where the vendor led creditors to believe the sale was absolute. Brayton v. Harding, 56 Ill. App. 362.

[1] Such was claimed and tacitly admitted in Beach's Appeal, 58 Conn. 464, 20 Atl. R. 475, to be the effect of Hine v. Roberts, 48 Conn. 267, 40 Am. R. 170, and Loomis v. Bragg, 50 Conn. 228, 47 Am. R. 638. So also Rodgers v. Bachman, 109 Cal. 552, 42 Pac. R. 448. See also the contracts of "Sale or Return," *post*, § 675 *et seq.*

[2] Appleton v. Norwalk Library Association, 53 Conn. 4, 22 Atl. R. 681; Beach's Appeal, *supra;* Geist v. Stier, 134 Pa. St. 216, 19 Atl. R. 505; Finlay v. Ludden & Bates South. Music House (1898), 105 Ga. 264, 31 S. E. R. 180.

tracts of this nature, to expressly stipulate that the vendor, in case of the buyer's default, may resume possession of the goods, and that for this purpose he may enter upon the buyer's premises and remove them. But even in the absence of such an express stipulation — there being no agreement to the contrary,— the seller would have the right to resume possession; and if the goods had been placed by the buyer upon his premises, the seller would, it is held, have an implied but irrevocable license to enter upon the buyer's premises to remove the goods.[1]

[1] Heath v. Randall, 4 Cush. (Mass.) 195.

The right reserved by the contract to enter upon the buyer's premises to retake the goods is irrevocable. Walsh v. Taylor, 39 Md. 592.

In Smith v. Hale (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485, there had been an exchange of a buggy for a heifer. The buggy was warranted, and there was a breach of the warranty under circumstances entitling the person who acquired the buggy to rescind. She tendered back the buggy and demanded the heifer, which was refused. She thereupon entered upon the other's land and took the heifer, and this action resulted. The court said: "The most important question in the case is whether, on these facts, the defendant had a right to enter upon the plaintiff's premises and reclaim her heifer. We are of opinion that she had. It is true that it has been held that, where nothing appears except that the goods of one person are upon the land of another, the owner of the goods has no implied license from the owner of the land to enter and take them away. Anthony v. Haneys, 8 Bing. 186. And this rule has been applied to the case of a mortgage of personal property before foreclosure, if the goods have been left in the mortgagor's possession. McLeod v. Jones, 105 Mass. 403, 7 Am. R. 539. But after foreclosure the mortgagee has an implied irrevocable license to enter and carry away his goods. McNeal v. Emerson, 15 Gray, 384. Where a piano was hired for an indefinite time, with no agreement giving to the owner a right to enter the hirer's premises and reclaim the piano without demand or notice, it was held that he had no implied license to do so. Smith v. Pierce, 110 Mass. 35. But where one sells personal property which is on his own land, the purchaser has an implied license to enter and take it away. Nettleton v. Sikes, 8 Metc. 34; Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373. In the present case, on the facts assumed, the defendant had a right to the possession of her heifer under her bargain with the plaintiff, and it was the plaintiff's duty to restore it, and the defendant had demanded it, and the plaintiff had refused to deliver it, and in this state of things, under the agreement between them, the law gave the defendant a right to enter and take away the heifer in the way in which she did it. Drake v. Wells, 11 Allen, 141; Heath v. Randall, 4 Cush. 195; Cooley on Torts, 50 et seq."

The seller may act in person or by his agent, and it is not necessary that the agent should have or should exhibit any authority in writing.[1] If the seller goes in person, he may take with him such agents or assistants as are necessary to remove the goods.[2]

§ 627. ——. Acting in pursuance of such a license, and exercising his right at a reasonable time and in a reasonable manner, the seller needs no legal process or other warrant, and is not liable as a trespasser for his act.[3] If, however, he seeks to enter at an unreasonable time or in an unreasonable manner, he may lawfully be resisted, and will make himself liable in damages if he persists.[4]

[1] North v. Williams, 120 Pa. St. 109, 13 Atl. R. 723. 6 Am. St. R. 695.

[2] Walsh v. Taylor, 39 Md. 592; Drury v. Hervey, 126 Mass. 519.

[3] Walsh v. Taylor, Heath v. Randall, North v. Williams, *supra;* Boyd v. Lofton, 34 Ga. 494; Watertown Steam Engine Co. v. Davis, 5 Houst. (Del.) 192.

The seller, acting in a proper manner, may not only peaceably enter the buyer's house, but he may go into those rooms or portions of it where he would be likely to find his goods, without being thereby a trespasser. Walsh v. Taylor, *supra.*

[4] In Drury v. Hervey, 126 Mass. 519, it appeared that the purchaser of the chattel rented a room in the house of a third person and there kept the chattel. The contract contained the usual provision giving the seller the right to enter and take the chattel upon default. The buyer being in default, the seller sent his servants to get the chattel. They found that the buyer was not in, and that the owner of the house was away, but his wife was present. They showed her the contract, stated their business, and sought admission. She asked them to wait two hours, when the buyer would be back, but they declined, and, pushing her away, went in and took the chattel. She sued the seller for damages for the assault, and it was held that her request to the servants to wait was a reasonable one and that their act was wrongful.

In Van Wren v. Flynn, 34 La. Ann. 1158, furniture had been sold under the condition that if not paid for it could be retaken, and was placed in the buyer's house. Shortly before the first payment fell due the buyer's wife became sick, and he was obliged temporarily to take her elsewhere. Before going he informed the seller of the facts, and stated that upon his return he would pay; and to this the seller made no objection. The buyer's absence was unexpectedly protracted by his wife's illness, so that he did not return until nearly a month after the last payment was due. Not hearing anything further from the buyer, the seller went one day with men and wagon to the buyer's house, which other members of

The law, moreover, does not encourage a forcible assertion of one's rights, and even though the seller may have an irrevocable license, if he cannot enter without violence or a breach of the peace, he should desist from his efforts and avail himself of his legal remedies.[1]

§ 628. Necessity of demand before recovery of goods.—Upon default by the buyer his right to the further possession of the

his family were occupying, stated that he had come for the furniture, and, disregarding their statement that the buyer was expected and their request that he defer until the buyer returned, took away the furniture. That night the buyer returned with his invalid wife and children and found their sleeping apartments denuded of furniture, so that they had to seek accommodations elsewhere. The buyer sued the seller for damages and was permitted to recover. "The agreement established on this record," said the court, "cannot shield the conduct of the defendant. It does not purport, in terms, to confer upon the defendant the right to enter the house of plaintiff in his absence without his consent and without notice and carry off its contents. An agreement conferring such extraordinary power would need to be so clearly worded and proven as to leave nothing to implication. The grant of the simple right to retake his furniture on nonpayment of the price cannot be construed to embrace such power."

In North v. Williams, 120 Pa. St. 109, 13 Atl. R. 723, 6 Am. St. R. 695, *supra*, the contract for the sale of a piano provided that in case of default the seller or his agent might "enter into and upon any premises where said piano may be, and without let or hindrance take away the same." The buyer being in default, the seller sent his agent to take away the piano. The agent rang the bell and was admitted to or entered the entry or vestibule (the case does not disclose by whom he was admitted). Here the buyer met the agent and asked him what he wanted, and the agent replied that he had come to tune the piano. The buyer asked the agent to wait while he went to call his wife. While the buyer was thus gone, the agent, having apparently admitted other servants of the seller, went with them into the parlor, where the piano was, and began to remove it. The buyer returning protested, but they took the piano away. The buyer sued the seller in trespass, contending that his agent had obtained permission by a subterfuge and that his acts were a trespass. The court, however, held that as the seller had a right to enter and remove the piano, the fact that the agent gained admission by a false reason did not destroy the right. "If a citizen desired to see another upon business which he knew to be unpleasant to the latter," said the court, "and chose to assign some other than the real reason for asking admission, he certainly would not become a trespasser merely because he failed to give the true reason."

[1] Drury v. Hervey, 126 Mass. 519; Churchill v. Hulbert, 110 Mass. 42.

goods ordinarily ceases, and the seller is again invested not only with the title but with the right to the immediate possession of the goods. Except, therefore, in those cases, already noticed,[1] in which the vendor has permitted the vendee to believe that a previous default will not be insisted upon, and those in which the contract by its terms requires a demand,[2] it is usually held that a demand for the goods is not necessary to entitle the vendor to retake the goods from the vendee upon default or to maintain replevin for their recovery.[3] Some cases, however, deem a demand necessary.[4]

[1] See *ante*, §§ 609, 624.

[2] In Wheeler & Wilson Mfg. Co. v. Teetzlaff, 53 Wis. 211, the court said: "The contract says the appellant [the seller] may, *at his option*, take the machine away if the payments are not made according to the terms of the contract. A fair construction of this contract would require the appellant to give notice to the respondent that it would exercise its option to take away the machine, on account of the non-payment of the purchase-money, before an action could be commenced to get possession thereof. A demand of possession, or notice to the respondent that the company would exercise its option to take possession of the machine, was especially necessary after the company had failed to take immediate advantage of the provision in the contract, and suffered the machine to remain in the respondent's possession for several months after such failure, during all that time demanding payment of the $5 claimed to be due. Under such circumstances, if the appellant determined to avail itself of the forfeiture of the money paid, and assert its right to the possession and ownership of the machine, notwithstanding it had received eight-ninths of the purchase-money, it was clearly its duty to give the respondent unequivocal notice of such determination on its part before exercising that right. Smith v. Newland, 9 Hun (N. Y.), 553; Johnston v. Whittemore, 27 Mich. 463; Giddey v. Altman, 27 Mich. 206; Deyoe v. Jamison, 33 Mich. 94; Cushman v. Jewell, 7 Hun, 525; Hutchings v. Munger, 41 N. Y. 155.

With reference to the first portion of this holding, its soundness may be open to question; upon the latter ground it is in accord with many cases elsewhere.

[3] In Hughes v. Kelly, 40 Conn. 148, it appeared that Hughes had contracted, under the form of a lease, to sell certain property to one Spreyer. Spreyer paid part but was in default

[4] Thus in Michigan a previous demand, where the buyer was in lawful possession of the chattel "and had nearly paid for it," was held necessary. New Home Sewing Mach. Co. v. Bothane, 70 Mich. 443, 38 N. W. R. 326; and in Illinois, Hamilton v. Singer Mfg. Co., 54 Ill. 370. So also Nattin v. Riley, 54 Ark. 30, 14 S. W. R. 1100. Davis v. Emery, 11 N. H. 230, which so held, is distinguished in Proctor v. Tilton, *supra*.

And where the goods have, without right, been transferred by the original vendee to a third person, the vendor may also,

as to several payments, when the property was attached by Kelly, a creditor of Spreyer, as the property of the latter. Hughes brought replevin against Kelly, having first demanded of him a return of the property, which was refused. It was contended that as Hughes had not demanded the property of Spreyer he had still the right of possession, and therefore Hughes could not maintain replevin. To this the court replied: "By the terms of the contract Hughes was at liberty, on the neglect of Spreyer to pay, to take the property into his possession wherever found. As the contract says nothing of any demand to be made previous to taking possession on default of payment, we find no warrant for interpolating such a provision into the contract."

In Proctor v. Tilton, 65 N. H. 3, 17 Atl. R. 638, Proctor was suing Tilton, a deputy sheriff, for taking on a writ of replevin, at the suit of one Winkley, a horse from the possession of Proctor. Tilton defended on the ground that Winkley at the date of the replevin writ was entitled to possession. The horse had been sold conditionally by Winkley to Proctor, who, though often requested, had paid no part of the price. Said the court: "By the terms of the contract Proctor had no title to the horse. He had the possession with the privilege of acquiring a title by payment within a reasonable time. Upon his failure to make such payment in a reasonable time his right to the possession of the horse terminated, and both the right of property and the right of possession were in Winkley, and he had the right to take the horse wherever he could find it. As Proctor had no right to the possession against Winkley no demand was necessary. Bailey v. Colby, 34 N. H. 29; McFarland v. Farmer, 42 N. H. 386, 390. The case differs from Davis v. Emery, 11 N. H. 230, where it was held that a demand and a reasonable notice to surrender the property or perfect the title was necessary, because by the terms of the contract the bailee had an election whether he would buy or not. So also in Kimball v. Farnum, 61 N. H. 348, a demand was held necessary because the time of payment had been extended with an understanding that the vendee might pay when he could, and therefore the vendee's possession was lawful."

Where goods are sold for cash or a note upon delivery, and delivery is obtained without paying the cash or giving the note, the vendor, who has not waived it, has the right to regain his goods, and no previous demand is necessary. Salomon v. Hathaway, 126 Mass. 482; Stone v. Perry, 60 Me. 48.

It is immaterial to a third person claiming rights in the property whether the seller made a demand for it before retaking it from the vendee. Moses v. Rogers, 62 Vt. 84, 19 Atl. R. 118.

If demand before replevin were necessary, the fact that the buyer has secreted himself to prevent a demand, or has left the jurisdiction, or denies the seller's rights, will excuse the want of demand. Wall v. De Mitkiewicz, 9 D. C. App. 109.

Where the vendor has taken peace-

without demand, recover the goods or their value from such third person, even though he is a *bona fide* purchaser for value.[1]

§ 629. Return of payments if property retaken by seller.— Whether payments already made upon the price by the purchaser are to be returned to him in case, for a later default, the goods are retaken by the seller, is a question which has given rise to some difficulty. If the contract be entirely *rescinded* and avoided from the beginning, the seller, it is held, must put the buyer *in statu quo*, by restoring to him what he has parted with upon the contract.[2] But, as has been seen, it is not usually

able possession of the property, but the vendee retakes it with force, the vendor need make no demand before replevying it. Hyland v. Bohn Mfg. Co., 92 Wis. 157, 65 N. W. R. 170.

[1] Gilmore v. Newton, 9 Allen (Mass.), 171, 85 Am. Dec. 749; Carter v. Kingman, 103 Mass. 517. (In this case it was a condition of the contract that the goods should not be sold or removed without the vendor's consent. Having been sold to and removed by a third person, he was held liable to the vendor as for a conversion, though he had acted in good faith and had parted with the goods before a demand was made upon him.) Galvin v. Bacon, 11 Me. 28; Prime v. Cobb, 63 Me. 200.

[2] Thus in Ketchum v. Brennan, 53 Miss. 596, where the vendee had resold the property and the vendor brought replevin for it, the court said: "A rescission of the contract by the plaintiff was a condition precedent to his right to sue for the property; and, to rescind, it was his duty to return or offer to return to his vendee what had been paid on the contract of sale. This he did." But see Duke v. Shackleford, 56 Miss. 552, where this statement is explained and modified, if not overruled.

In Drew v. Pedlar, 87 Cal. 443, 25 Pac. R. 749, 22 Am. St. R. 257, a case of sale of land with a stipulation for forfeiture, in which the buyer, after making a payment of $1,000, defaulted until after the stipulated time, and then tendered performance, which was refused, the court said: "From the time defendants refused to accept payment and execute a deed, the plaintiff has considered the contract rescinded and bases this action partly upon that ground, his complaint stating facts from which a rescission is a necessary inference. Under these circumstances the plaintiff was entitled to recover the one thousand dollars paid by him, less such actual damages as may have been sustained by the defendants by plaintiff's breach of the contract. Grey v. Tubbs, 43 Cal. 359; Cleary v. Folger, 84 Cal. 316, 18 Am. St. R. 187."

In Latham v. Davis, 44 Fed. R. 862, it is said that the better rule is "that in reclaiming the property the seller rescinds the contract in so far as it has been executed, and is thereupon bound to restore to the buyer anything that he may have received in the way of payment." Citing Hamilton v. Singer Mfg. Co., 54 Ill. 370;

necessary for the seller to go so far as to *rescind* the contract;[1] he may retake the property, in case of a default, in pursuance of the contract and by its authority, and where he does so it is well settled that, unless the contract itself or some statute

Hine v. Roberts, 48 Conn. 267, 40 Am. R. 170; Preston v. Whitney, 23 Mich. 260.— *sed quære.*

In Brewster v. Wooster (1892), 131 N. Y. 473, 30 N. E. R. 489, there seems to have been a clear case of rescission.

[1] In Tufts v. D'Arcambal, 85 Mich. 185, 48 N. W. R. 497, 24 Am. St. R. 79, 12 L. R. A. 446, the condition was that the title should remain in the seller until notes given for the price were paid, and that the seller should have the right, in case of default, "without process of law, to enter and retake immediate possession of said property, wherever it may be, and remove the same." The action was replevin to regain possession of the property from the buyer in default, and the buyer sought to impress upon the property a lien for the amount he had paid upon it. The court said: "It will be observed that the contract here does not provide for a rescission thereof before plaintiff should have the right to reduce the property to his possession, nor does it provide that the taking of possession should rescind the contract or work a forfeiture of the amount paid upon the apparatus, but the plaintiff treats the contract as still existing and executory. The contract provides expressly that the title to the property shall continue to remain in plaintiff until the apparatus is paid for, and that, in case of the non-payment of either of the notes at maturity, the plaintiff should have the right to take possession of the property; but it contains no provision that such act shall operate as a rescission of the contract or a forfeiture of the payments thereon. The reduction of the property to possession by plaintiff does not excuse performance by defendant, as defendant has the right, upon payment of the amount due, to a return of the property. Plaintiff had the right, under the express conditions of the contract, to secure himself by taking possession, and the exercise of this right under the contract did not entitle the defendant to rescind the contract, or to a recovery of the amount paid, or to a delivery to him of the unpaid notes; neither did it give him any lien upon the property for the amount paid by him."

Declaring contract "void."— It is a common provision in contracts of this nature that, in case of default, the seller shall have the right to declare the contract "void," recover the property, and retain what has been paid upon it. What do the parties mean by declaring the contract *void?* As of what time does it become *void?* Is this equivalent to a *rescission* or a *termination* merely? If a contract is *void* it is of no effect, and no rights can be based upon it by either party. If it is *rescinded* the parties must ordinarily be placed *in statu quo.* If it is *terminated* so far as the vendee's right to further possession and longer time in which to pay are concerned, this would not be inconsistent with the seller's remedy under the contract, or with rights

expressly requires it, he is not obliged to restore what he has received, as a condition precedent to resuming possession.[1] Statutes, however, in some States do require it.[2]

still remaining in the buyer. Ordinarily a provision in a contract that it shall be "void" in a certain contingency means only that it may be treated as voidable. In Preston v. Whitney, 23 Mich. 260, the stipulation was that on default the seller should be entitled to possession, "and said agreement to sell . . . shall become void." Said the court: "From the time of the taking of possession the agreement for the sale may be treated as void, or more properly as terminated." In Johnston v. Whittemore, 27 Mich. 463, the provision was that in case of default the seller might declare the agreement void, recover the property, and retain the payments already made as damages for the non-performance of the agreement. See also Hayes v. Nashville, 47 U. S. App. 713.

[1] Unless the contract so provides, a return of what has been received under it is not a condition precedent to the vendor's right to recover the property on the seller's default. "Strictly speaking, his action in retaking the property is not a rescission of the contract, but in pursuance of it." Fairbanks v. Malloy, 16 Ill. App. 277. Retaking the property by the seller on default is "in affirmance, and not in avoidance, of the contract, and the seller having performed on his part, the purchaser could have no right to rescind it or to treat it as rescinded." Singer Mfg. Co. v. Treadway, 4 Ill. App. 57. To same effect: Latham v. Sumner, 89 Ill. 233, 31 Am. R. 79; Tufts v. D'Arcambal, *supra;* White v. Oakes, 88 Me. 367, 34 Atl. R. 175, 32 L. R. A. 592; Duke v. Shackleford, 56 Miss. 552.

"The plaintiff [seller] was entitled to the possession of the property without paying back anything to the defendant; and whether the defendant should ever receive anything back, or should be paid anything for what he had already paid to the plaintiff, is a question for further consideration." Fleck v. Warner, 25 Kan. 492.

[2] Thus, in Ohio the vendor cannot retake the property without tendering back to the purchaser the amount paid by him "after deducting therefrom a reasonable compensation for the use of such property." Acts 1885, p. 239, § 2; Speyer v. Baker, 59 Ohio St. 11, 51 N. E. R. 442; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. R. 719. This statute is constitutional. Weil v. State, 46 Ohio St. 450, 21 N. E. R. 643.

A substantially similar statute exists in Missouri. R. S. 1879, § 2508.

In Vermont and Tennessee the vendee's rights are protected by requiring a foreclosure by public sale. See French v. Osmer, 67 Vt. 427; Lieberman v. Puckett, 94 Tenn. 273.

In Louisiana purchasers of sewing machines are protected. Jenks v. Howe Sewing Mach. Co., 34 La. Ann. 1241.

In Georgia, under the code and practice, the court may "mould the verdict so as to do full justice to the parties, and in the same manner as a decree in equity." Hays v. Jordan, 85 Ga. 741, 11 S. E. R. 833, 9 L. R. A. 373.

§ 630. —— **Equities of purchaser.**— Whether the buyer, after such retaking,— not a rescission,— has any rights or equities by reason of his payments, which may be made effectual by any means, is also a question of some uncertainty. It is usual, in the contract, to expressly stipulate that payments already made shall be forfeited to the seller, either as compensation for use and depreciation or as liquidated damages for the breach of the contract. Stipulations of this nature, when clearly declared and reasonable in amount, are constantly enforced under the well-settled rules governing liquidated damages;[1] but even where the stipulation is not thus reasonable, it is difficult to see what standing the vendee, in default, can have in a court of law to recover from the vendor the excess after satisfying the latter's reasonable demands.[2] A court of equity may give relief,[3] but an adjustment of equities cannot be worked out in an action of replevin brought by the vendor to recover the goods upon default,[4] though trover may be found more flexible.[5]

§ 631. —— **How when action against third person.**— In actions by the vendor against third persons to recover as for a conversion of the goods by them, it is held that he may recover the full value of the goods without any deduction for what may have been paid by the original vendee.[6]

§ 632. —— **Return of notes received.**— The buyer's note for the price is often made a part of the contract of sale. Frequently the stipulations showing the conditional character of

[1] See, *e. g.*, Wheeler & Wilson Mfg. Co. v. Jacobs, 2 N. Y. Misc. 236.

[2] See Lowrie v. Gourlay, 112 Mich. 641, 71 N. W. R. 174; Satterlee v. Cronkhite, 114 Mich. 634, 72 N. W. R. 616.

[3] See Lowrie v. Gourlay, *supra*.

[4] Ryan v. Wayson, 108 Mich. 519, 66 N. W. R. 370; Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. R. 159.

[5] See Johnston v. Whittemore, 27 Mich. 463, where, in an action of trover, the seller was permitted to recover only according to his interest.

[6] Angier v. Taunton Paper Co., 1 Gray (Mass.), 621, 61 Am. Dec. 436; Carter v. Kingman, 103 Mass. 517; Colcord v. McDonald, 128 Mass. 470; Brown v. Haynes, 52 Me. 578; Everett v. Hall, 67 Me. 497.

the contract of sale are incorporated in or attached to the note; on other occasions the note is physically entirely separate. Whether such a note is to be returned upon a recovery of the property depends largely upon the considerations mentioned in the preceding sections. If the note were taken as payment, "either absolute or conditional," it was said in one case,[1] "it might well be argued that, as the plaintiffs [the sellers] were not entitled both to the property and to the purchase price of the property, they would be put to their election, and, if they insisted upon recaption of the property, they could only take it after a surrender of the notes." So, where the note and the contract are separate, a transfer of the note, apart from the contract, thus putting it out of the seller's power to return it, is evidence that he elects to treat it as payment, and this precludes recovery of the goods.[2]

§ 633. ——. In the ordinary case, however, the note is not payment, but simply evidence of the undertaking of the vendee; and while if the seller rescind he should return the note, he is usually, as has been seen, not obliged to rescind, nor is he bound to surrender the evidence of the contract.[3] If a return in such a case becomes necessary, as where the action is for damages or a deficiency after sale, restitution upon the trial would undoubtedly suffice.[4]

§ 634. **Destruction of property before payment.**—The question of the effect of the accidental destruction of the property before it was fully paid for has also given rise to decisions apparently in conflict. The true view would seem to be that the loss follows the title.[5] Hence in the case of the conditional

[1] Van Allen v. Francis (1899), 123 Cal. 474, 56 Pac. R. 339, citing Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. R. 687.

[2] Merchants' Bank v. Thomas (1887), 69 Tex. 237; Parlin, etc. Co. v. Harrell (1894), 8 Tex. Civ. Ap. 368, 27 S.W. R. 1084.

[3] Kirby v. Tompkins, 48 Ark. 273, 3 S. W. R. 363; Lippincott v. Rich (1900), — Utah, —, 61 Pac. R. 526. See also Fleck v. Warner, 25 Kan. 492; Bauendahl v. Horr, 7 Blatch. 548, Fed. Cas. No. 1,113.

[4] See Brewer v. Ford (1889), 54 Hun (N. Y.), 116.

[5] See Williams v. Allen, 10 Humph. (Tenn.) 337, 51 Am. Dec. 709; Black

contract to sell, where no title passes until payment in full, the loss, unless otherwise provided by the contract, would fall upon the party agreeing to sell; while in the case of a sale upon condition subsequent the loss would fall upon the purchaser; and so the decisions are, when not complicated by other facts.[1]

§ 635. ——. At the same time it is possible that, even in case of a contract of the first kind, the party undertaking to sell may, by the terms of the agreement, be entitled to recover the sum agreed to be paid notwithstanding the destruction of the property. In one case[2] the defendant Burnley had entered into a contract for the purchase of a soda fountain from the plaintiff Tufts and had given his notes for the amount payable at different times. These notes stipulated that the title should remain in Tufts until payment, and in case of default in payment of any one of them he might resume possession. After part of the notes had been paid, the property while in possession of Burnley was burned without his fault, and he refused to pay the remaining notes. Tufts sued to recover on these notes and succeeded. Said the court: "Burnley unconditionally and absolutely promised to pay a certain sum for the prop-

v. Webb, 20 Ohio, 304, 55 Am. Dec. 456.

[1] See Swallow v. Emery, 111 Mass. 355; Stone v. Waite, 88 Ala. 599, 7 S. R. 117; Bishop v. Minderhout, —— Ala. ——, 29 S. R. 11; Randle v. Stone, 77 Ga. 501. In this case it is said: "The reservation of title and ownership is without any modification or condition whatever. It is absolutely reserved up to the maturity of the notes; not only 'title' is so reserved, but, by way of emphasis, 'ownership' is added. The owner must bear the loss if there be no fault in the actual possessor who is a bailee. 1 Benjamin on Sales, § 620; 1 Parsons, Contracts, 526, 533, 537 (note), 51 Am. R. 59, 62, 63; 1 Benj., §§ 412, 427." To same effect: Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. R. 565.

[2] Burnley v. Tufts, 66 Miss. 48, 5 S. R. 627, 14 Am. St. R. 540. This case was approved and followed in Tufts v. Griffin (1890), 107 N. C. 47, 12 S. E. R. 68, 22 Am. St. R. 863, 10 L. R. A. 526, where the court also take the same view of the nature of the contract, *i. e.*, that it was "a conditional sale to be defeated upon the non-performance of the conditions." Swallow v. Emery, *supra*, was said to be perhaps distinguishable upon the ground that in that case the vendor was to execute a bill of sale to the vendee upon the payment of the price. Burnley v. Tufts is also approved in Tufts v. Wynne, 45 Mo. App. 42, and Osborn v. South Shore Lumber Co. (1895), 91 Wis. 526, 65 N. W. R. 184.

erty, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he could have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract he has made, his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do." The contract made in this case, it will be observed, fell within the class of those which amount to "something more than an executory conditional sale."

§ 636. Additions to or increase of property before payment.— As the risk of loss or destruction thus usually follows the title, so the chance of gain or advantage from accessions or additions to, or the increase or increment of, the chattel, is usually held to likewise follow the title. Thus, in a number of cases where a conditional contract for the sale of a mare has been made, it has been held that a colt foaled before the title has passed belonged, in case of default, to the owner of the mare, and this whether the colt was begotten before[1] or after[2] the making of the contract. In the same manner per-

[1] Allen v. Delano, 55 Me. 113, 92 Am. Dec. 573.

[2] Buckmaster v. Smith, 22 Vt. 203; Clark v. Hayward, 51 Vt. 14; Elmore v. Fitzpatrick, 56 Ala. 400. See also Desany v. Thorp, 70 Vt. 31, 39 Atl. R. 309.

manent additions, improvements or repairs belong, usually, as accessions, to the owner of the chattel to which they are made.[1]

This is in analogy to the rule prevailing in respect of chattel mortgages by which additions to the property or its increase inure to the benefit of the mortgagee.[2]

§ 637. —— **Additions to stock of goods sold.**— But the doctrine of the preceding section has been held not to apply, in the absence of express contract, to cases of the sale of a stock of goods from which the vendee is to be permitted to sell at retail and which he is to replenish by purchases. Thus, in such a case,[3] the court said: "There cannot be a transfer of title by bringing in goods in this way without a clear agreement to that effect. The writing contains no such agreement. It nowhere says that the [seller] is to acquire any title under the instrument. . . . It is silent in regard to the ownership of the property to be bought by [the vendee] to keep up his stock. If it was the intention of the parties that the title to this property should pass to the [seller] whenever it was put with the stock of goods, they failed to express it."

[1] See Eaton v. Munroe, 52 Me. 63 (the facts of which are stated in the note to the following section). But in Wiggins v. Snow (1891), 89 Mich. 476, 50 N. W. R. 991, where the vendor failed to supply certain parts or appurtenances of a machine sold, and the vendee was obliged to procure them, it was held that these parts belonged to the vendee and could not be taken by the seller on recovering the machine. See also Richardson Drug Co. v. Teasdall (1897), 52 Neb. 698, 72 N. W. R. 1028, more fully referred to in section following on "Accession and confusion," § 642.

[2] Thus additions, repairs or improvements to chattels mortgaged, completions of incomplete chattels mortgaged, and the like, will pass by the mortgage. Harding v. Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Perry v. Pettingill, 33 N. H. 433; Crosby v. Baker, 6 Allen (Mass.), 295; Ames, Ex parte, 1 Low. (U. S. C. C.) 561; Bryant v. Pennell, 61 Me. 108, 14 Am. R. 550. So will the young born of animals mortgaged. Rogers v. Highland, 69 Iowa, 504, 29 N. W. R. 429, 58 Am. R. 230; Kellogg v. Lovely, 46 Mich. 131, 8 N. W. R. 699, 41 Am. R. 151; Darling v. Wilson, 60 N. H. 59, 49 Am. R. 305.

[3] Harding v. Lewenberg (1899), 174 Mass. 394, 54 N. E. R. 870. Richardson Drug Co. v. Teasdall (1897), 52 Neb. 698, 72 N. W. R. 1028, accords.

§ 638. Changes in the form or nature of the property.— Where, after the delivery to the prospective purchaser, but before payment, the goods are changed in form or nature or are incorporated into other chattels, the question of the right of the proposed seller to follow and recover them, in case of default, presents interesting and difficult considerations. The question has not frequently presented itself in reference to the class of cases now under consideration, but analogy to general principles would seem to suggest the following rules, under which the seller's rights would be preserved, unless he has done something to waive them or estop himself from asserting them.[1] The question may present itself in three classes of cases: (1) Where the change was wrongfully made; (2) where it was not wilful but accidental, as through a mistake of fact; and (3) where the change was rightful, or at least made without wilful or intentional wrong.

§ 639. ——. 1. Where the prospective purchaser has made the change wrongfully, the proposed seller may, in case of default, recover his property in its changed form, without refer-

[1] In Eaton v. Munroe, 52 Me. 63, plaintiff had delivered to one Hall about $40 worth of canvas. This Hall was to make into a sail which was to remain the property of plaintiff until paid for. Hall had the canvas made into the sail, as agreed, at an expense for labor and materials of about $18, and then, without paying plaintiff, sold the sail to one Chase, and Chase sold it to defendant. The plaintiff, after demand, replevied the sail and was held entitled to recover, not only because the sail was to be his until paid for, but also on the ground of accession.

In Hineman v. Matthews, 138 Pa. St. 204, 20 Atl. R. 843, 10 L. R. A. 233, it was held that, where timber was conditionally sold, the fact that it was converted into lumber did not deprive the seller of his right to take possession of the lumber after default in payment by the purchaser.

In Wing v. Thompson, 78 Wis. 256, 47 N. W. R. 606, a contract had been made for the sale of standing timber which was to be cut and removed by the vendees and kept in their possession, but the title was to remain in the vendor until full payment was made. Said the court: "It may be premised that a contract of this kind is not favored in the law, and the right to enforce the reservations as against a *bona fide* purchaser without notice must be based upon evidence which shows that the plaintiff has not done anything in regard to such property while in the hands of his vendee which would amount to a waiver of his right or estop him from asserting his title against a purchaser from his vendee."

ence to the degree of the improvement or the additional value given to it by the labor of the wrong-doer, provided that the original chattels are still capable of identification, or, according to some cases, provided that they can be traced into the new form though their identity be lost.[1] "This rule," says

[1] "As a general rule," says Cooley, J., "one whose property has been appropriated by another without authority has a right to follow it, and recover the possession from any one who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. . . . No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value." Wetherbee v. Green, 22 Mich. 311, 7 Am. R. 653.

"In Betts v. Lee, 5 Johns. 348, 4 Am. Dec. 368, it was decided," says Ruggles, J., "that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees and made them into shingles. The property could neither be identified by inspection nor restored to its original form; but the plaintiff recovered the value of the shingles. So in Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser cannot acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries (vol. 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession

Ruggles, J.,[1] "holds good against an innocent purchaser from the wrong-doer, although its value be increased a hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership." An exception exists where the change was made by the innocent purchaser himself, believing himself to be the owner. In this case, if the identity be destroyed, the true owner may recover only the value of the original chattel and not the chattel in its improved or altered form.[2]

§ **640.** ——. 2. Where the change was not wilful, but accidental, and the original can still be identified, the owner may have it in its altered form unless the additions have gone further than the original chattel to make up its present improved form, in which case he may have simply the value of the original.[3]

§ **641.** ——. 3. Where the change was not wrongful, the original owner may recover his chattel even in its improved form

if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the Year Books that whatever alteration of form any property had undergone, the owner might seize it in its new shape if he could prove the identity of the original materials. The same rule has been adopted in Pennsylvania: Snyder v. Vaux, 2 Rawle, 427, 21 Am. Dec. 466." Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307. In this case whisky made from corn wrongfully taken was held to belong to the owner of the corn. See also interesting illustrations and discussions in Strubbee v. Railway Co., 78 Ky. 481, 39 Am. R. 251; Murphy v. Railroad Co., 55 Iowa, 473, 8 N. W. R. 320, 39 Am. R. 175; Hazelton v. Weeks, 49 Wis. 661, 35 Am. R. 796; Heard v. James, 49 Miss. 236.

[1] In Silsbury v. McCoon, *supra*. To same effect: Strubbee v. Railway Co., *supra*, disapproving of Lake Shore R. Co. v. Hutchins, 32 Ohio St. 571, 30 Am. R. 629.

[2] Silsbury v. McCoon, *supra;* Wetherbee v. Green, *supra*.

[3] Wetherbee v. Green, 22 Mich. 311, 7 Am. R. 653, is the leading case upon this subject. There timber of the value of $25 had been, in the exercise of what was supposed to be proper authority, converted into hoops of the value of $700, and it was held that while, as a general rule, the owner may recover his property in its increased form, yet where, as here, the act was not wilful, and the change in value was so great, he could recover only the original value. But in Isle Royal Mining Co. v. Hertin, 37 Mich. 332, 26 Am. R. 520, where the disparity in values was slight, the contrary result was reached. See the note to this case in 26 Am. R. 525.

unless its identity has been lost, or the alterations or additions exceed it in value, in which case also he may recover simply the value of the original.[1]

§ 642. Accession and confusion of goods.— The question of the confusion of goods presents substantially the same considerations. Four cases may here present themselves: (1) The authorized commingling. (2) The wilful or tortious commingling. (3) The unintentionally mistaken commingling; and (4) The commingling by accident or *vis major*. Without going at large into the subject, it may be said that the following rules apply:

1. Where the commingling was with the consent of the parties, they become tenants in common of the mass.[2]

2. Where the confusion was tortious, the parties will still be treated as tenants in common, if the parts are of like nature and value; or, if the goods of each can be distinguished, then each may take his own; but where they are of different kinds and value, or the goods of each cannot be distinguished, the innocent owner will take the whole.[3]

[1] See 2 Schouler, Personal Property, 37; Bishop, Non-Contract Law, § 939.

[2] Dole v. Olmstead, 36 Ill. 150, 85 Am. Dec. 397; s. c., 41 Ill. 344, 89 Am. Dec. 386; Sexton v. Graham, 53 Iowa, 181, 4 N. W. R. 1090; Nowlen v. Colt, 6 Hill (N. Y.), 461, 41 Am. Dec. 756.

[3] "There is no forfeiture," says Shepley, C. J., "in a case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule and is fully sustained by authority." Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627. See also Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; First Nat. Bank v. Hummel, 14 Colo. 259, 23 Pac. R. 986, 20 Am. St. R. 257; Little Pittsburg Mining Co. v. Mining Co., 11 Colo. 223, 17 Pac. R. 760, 7 Am. St. R. 226; First Nat. Bank v. Schween, 127 Ill. 573, 11 Am. St. R. 174; First Nat. Bank of Elgin v. Kilbourne, 20 N. E. R. 681; Stephenson v. Little, 10 Mich. 433.

In Richardson Drug Co. v. Teasdall (1897), 52 Neb. 698, 72 N. W. R. 1028, where the subject-matter of the sale was a stock of drugs, which the vendee was, by the contract, to dispose of at retail and not to deplete, it was held that, on default, the vendor was entitled only to so much of the original stock as remained undisposed of, and not to additions made by the vendee; and that the vendee's mixing of the goods absolutely purchased by him with the goods conditionally purchased was neither wrongful nor fraudulent within such principles as are dis-

3. If the confusion was caused by the unintentional mistake of the party making it, the parties will usually be regarded as tenants in common, if their contributions are of like kind and value, and the share of each can be ascertained; but, if not, the person by whose carelessness, folly or misfortune the confusion was caused must lose his share.[1]

4. If the confusion was caused by inevitable accident or *vis major*, each may recover his share if distinguishable, otherwise they will be held to be tenants in common of the mass.[2]

§ 643. **Substitution of goods.**— If the property originally agreed to be sold is exchanged by the prospective purchaser for other chattels, the latter do not thereby become the property of the vendor or subject to the contract,[3] though with the consent of both parties such a substitution may be made.[4]

§ 644. **Effect of annexing chattels conditionally sold to the freehold.**— The annexation of the chattels contracted to be sold to his freehold by the conditional purchaser raises all of the vexed and difficult questions which attend the subject of fixtures generally.

§ 645. —— **As between the immediate parties** to the transaction there can ordinarily be no difficulty in preserving the character of the chattels as personalty, even though annexed

cussed in the text. Wiggins v. Snow, 89 Mich. 476, 50 N. W. R. 991, was cited and relied upon. See also Harding v. Lewenberg, 174 Mass. 394, 54 N. E. R. 870.

[1] Ryder v. Hathaway, 21 Pick. (Mass.) 298; Pratt v. Bryant, 20 Vt. 333; Hesseltine v. Stockwell, *supra;* Thome v. Colton, 27 Iowa, 425.

[2] Spence v. Insurance Co., L. R. 3 C. P. 427; Moore v. Railway Co., 7 Lans. (N. Y.) 39.

[3] Nattin v. Riley, 54 Ark. 30, 14 S. W. R. 1100; Dedman v. Earle, 52 Ark. 164, 12 S. W. R. 330.

In Smith v. Gufford, 36 Fla. 481, 18 S. R. 717, it is held that if a horse sold conditionally be wrongfully killed by a railroad company, either the vendor or vendee may sue to recover the damages. If the vendee sues and recovers, the vendor has a claim upon the vendee for money had to his use to the extent of the original purchase price; but if the vendee uses the money to buy another horse, it does not become the property of the original vendor, nor has he any lien upon it for the purchase price of the horse killed.

[4] Kelsey v. Kendall, 48 Vt. 24; Perry v. Young, 105 N. C. 463, 11 S. E. R. 511.

to the realty with the seller's assent, so long as they remain distinguishable and severable.[1] The same rule applies also against creditors of the vendee;[2] but when the claims of mortgagees or purchasers of the land, to which such chattels have been annexed, arise, questions of difficulty present themselves.

§ 646. —— **As against subsequent purchasers** without notice, the condition, by the weight of authority, could not operate to characterize as personalty that which appears to be, and by its ordinary nature is, a part of the realty.[3] The same rule also applies in respect of a subsequent mortgagee of the land where he takes without notice,[4] but not where he took with

[1] Harkey v. Cain, 69 Tex. 146, 6 S. W. R. 637; Brewing Ass'n v. Manufacturing Co., 81 Tex. 99, 16 S. W. R. 797; Lansing Iron Works v. Walker, 91 Mich. 409, 51 N. W. R. 1061, 30 Am. St. R. 488; Tyson v. Post, 108 N. Y. 217, 15 N. E. R. 316, 2 Am. St. R. 409; Rogers v. Cox, 96 Ind. 157, 49 Am. R. 152; Price v. Malott, 85 Ind. 266, 109 Ind. 22; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. R. 107; Haven v. Emery, 33 N. H. 66.

[2] Sturgis v. Warren, 11 Vt. 433; Sisson v. Hibbard, 75 N. Y. 542.

[3] Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Powers v. Dennison, 30 Vt. 752; Hunt v. Bay State Iron Co., 97 Mass. 279; Tibbetts v. Horne, 65 N. H. 242, 23 Atl. R. 145, 23 Am. St. R. 31; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. R. 120, 10 N. W. R. 842; Hobson v. Gorringe (1897), 1 Ch. 182; Watson v. Alberts, 120 Mich. 508, 79 N. W. R. 1048; Landigan v. Mayer (1898), 32 Oreg. 245, 51 Pac. R. 649, 67 Am. St. R. 521. But see Mott v. Palmer, 1 N. Y. 564; Ford v. Cobb, 20 N. Y. 344, where it is held that the subsequent purchaser gets no title, but must rely on the warranties in his deed.

[4] Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519, 15 Am. St. R. 235, 6 L. R. A. 249, 23 N. E. R. 327 [citing Hunt v. Bay State Iron Co., *supra*; Thompson v. Vinton, 121 Mass. 139; Southbridge Sav. Bank v. Exeter Mach. Wks., 127 Mass. 542; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. R. 493]: Tibbetts v. Horne, 65 N. H. 242, 23 Atl. R. 145, 23 Am. St. R. 31; Pierce v. George, 108 Mass. 78; Wickes v. Hill, 115 Mich. 333, 73 N. W. R. 375. But *contra* in Alabama. Warren v. Liddell (1895), 110 Ala. 232, 20 S. R. 89, citing many other cases from that state.

A planer used in a saw-mill, although some fastening be necessary to its use, is not such a fixture as to pass with a subsequent mortgage of the realty, as against the conditional vendor, especially as the mortgage was merely to secure an antecedent indebtedness. Cherry v. Arthur, 5 Wash. 787, 32 Pac. R. 744.

When chattels are sold under an agreement that the title shall not pass until full payment, and are delivered to the purchaser after he has made a mortgage covering after-acquired property, of which mort-

notice that the chattels still retained their character as personalty.[1]

§ 647. —— As to a prior mortgagee of the land, the rule seems to be that a chattel not intended to become a fixture, and so affixed as to be removable without destroying or seriously injuring either the chattel itself or the realty to which it is attached, may, by virtue of a reservation of title in the vendor, retain its character as personalty and be subject to his rights.[2]

gage the vendor has constructive notice through its record, the vendor's lien on such chattels for their price will prevail, as against the mortgagee, provided such chattels are separate and distinct personalty, and do not become part of the real estate mortgaged; but if, with the consent of the vendor, implied by his knowledge of the mortgage, such chattels become part of the realty, they are subject to the lien of the mortgage. A stipulation in a contract for the sale of chattels that they shall not become or be deemed a part of any real estate cannot alter, as against one not a party to such contract, the legal effect of what may afterwards be done with such chattels. New York Sec. & Tr. Co. v. Capital Ry. Co., 77 Fed. R. 529.

[1] Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 21 Am. St. R. 231, 9 L. R. A. 676, 25 N. E. R. 558.

The retention of open control by a vendor's employee over machinery placed in the works of a company which were being fitted up by the vendee is notice to said company of the existence of a vendor's lien. Holly Mfg. Co. v. New Chester Water Co., 48 Fed. R. 879.

Where machinery is sold and placed in a building for the purpose of making it available as a manufactory, but under an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, it may properly be deemed personal property as against a mortgagee who with full knowledge consents to the arrangement, and may be removed by the seller who retained the title, although it has the character of a fixture and has been permanently annexed. Hawkins v. Hersey, 86 Me. 394, 30 Atl. R. 14.

Chattels were conditionally sold to the tenant of a building, who placed them in the building, but without affixing them to such an extent that they could not be removed without injury to the building. He surrendered the building with those chattels to his landlord, who afterwards leased the building and the chattels to other tenants; but it was held that the surrender of the building with these chattels affixed did not affect the title of the conditional vendor or his right to remove them. Medicke v. Sauer, 61 Minn. 15, 63 N. W. R. 110.

[2] Binkley v. Forkner, 117 Ind. 176, 19 N. E. R. 753, 3 L. R. A. 31; Eaves v. Estes, 10 Kan. 314, 15 Am. R. 345; Tifft v. Horton, 53 N. Y. 377, 13 Am. R. 537; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. R. 279, 6 Am. St. R. 889; Fosdick v. Schall, 99 U. S. 235; Schumacher v. Allis, 70 Ill. App. 556;

Where, however, "the articles are of such a character that their detachment would involve a destruction or dismantling of an important feature of the realty, such annexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation."[1]

§ 648. **Conflict of laws.**— Contracts of this sort, though made in one State, and in contemplation of its laws, may, by reason of the removal of the parties or the property into another State, fall within the influence of varying if not conflicting laws; and it becomes necessary to inquire by what law the rights of the parties are to be determined.

§ 649. —— "The general rule," it is said in one case,[2] "is that the validity and effect of contracts relating to personal property are to be determined by the laws of the State or country where they are made, and, as a matter of comity, they will, if valid there, be enforced in another State or country, although not executed or recorded according to the law of the latter. And the rule has been applied, in a great number of cases, to chattel mortgages, where the mortgagor removes with the property into another State, continuing in possession of it, permissible by the law of the former, under circumstances that, had the mortgage been executed in the latter State by

German Savings Society v. Weber, 16 Wash. 95, 47 Pac. R. 224; Baldwin v. Young, 47 La. Ann. 1466, 17 S. R. 883; Walburn-Swenson Co. v. Darrell, 49 La. Ann. 1044, 22 S. R. 310.

Campbell v. Roddy, *supra*, was followed and applied in Palmateer v. Robinson, 60 N. J. L. 433, 38 Atl. R. 957, in a case arising between a prior conditional vendor of the realty and a subsequent conditional vendor of the chattel. It is distinguished in Warren v. Liddell, 110 Ala. 232, 20 S. R. 89.

[1] Campbell v. Roddy, *supra*.

[2] Keenan v. Stimson, 32 Minn. 377, 20 N. W. R. 364 [citing Jones, Chat. Mort., §§ 260, 299–301; Offutt v. Flagg, 10 N. H. 46; Ferguson v. Clifford, 37 N. H. 86; Cobb v. Buswell, 37 Vt. 337; Jones v. Taylor, 30 Vt. 42; Taylor v. Boardman, 25 Vt. 581; Ballard v. Winter, 39 Conn. 179; Langworthy v. Little, 12 Cush. (Mass.) 109; Bank v. Danforth, 14 Gray (Mass.), 123; Martin v. Hill, 12 Barb. (N. Y.) 631; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Wilson v. Carson, 12 Md. 54; Smith v. McLean, 24 Iowa, 322; Simms v. McKee, 25 Iowa, 341; Feurt v. Rowell, 62 Mo. 524]; Gross v. Jordan, 83 Me. 380, 22 Atl. R. 250; Woolley v. Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. R. 789.

one resident therein, would have made it invalid as against creditors or purchasers." This rule has, with substantial unanimity, been applied to cases of conditional contracts of sale.[1]

[1] A contract made in New Hampshire and there valid will be held valid in Vermont, though not reduced to writing or recorded as there required. Dixon v. Blondin, 58 Vt. 689, 5 Atl. R. 514. To same effect: Barrett v. Kelley, 66 Vt. 515, 29 Atl. R. 809; Wooley v. Wagon Co., *supra;* Gross v. Jordan, *supra;* Public Parks Amusement Co. v. Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. R. 582; Baldwin v. Hill, 4 Kan. App. 168, 46 Pac. R. 329; Harper v. People, 2 Colo. App. 177. 29 Pac. R. 1040; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 Atl. R. 20.

By the laws of Georgia a reservation of title by the seller until the property is paid for, though invalid as against third persons unless the contract is reduced to writing, acknowledged and duly recorded, is valid as between the parties; and if the purchaser, holding possession under such a conditional sale, brings the property into Alabama and there sells it to a third person, the title of the latter cannot prevail against that of the original vendor under the laws of Georgia. Weinstein v. Freyer, 93 Ala. 257, 9 S. R. 285, 12 L. R. A. 700.

By the laws of New Jersey a conditional contract of sale was valid against a *bona fide* purchaser from the conditional vendee. By the law of Pennsylvania it is not good against such a *bona fide* purchaser, though it is good as between the parties. S. made a contract for the purchase of a safe with the Marvin Safe Co. in Philadelphia by which the company reserved title till the safe was paid for. The safe was sent to New Jersey, where S. resided. He there sold it to N., a *bona fide* purchaser. In trover by the safe company against N. it was held that N.'s rights were determined by the law of New Jersey, but that he acquired only such title as S. had when the property was brought into New Jersey, and that therefore the title was in the company. Marvin Safe Co. v. Norton, 48 N. J. L. 410, 7 Atl. R. 418, 57 Am. R. 566. (Compare the earlier case of The Marina, 19 Fed. R. 760, in the New Jersey district court.)

B. made a contract in Michigan for the purchase from W. of a piano. W. reserved title till paid for. B. removed the piano to Illinois without W.'s knowledge or consent and there mortgaged it to C. The contract was good in Michigan against even a *bona fide* sub-vendee though not recorded. Such a contract was not good in Illinois against a *bona fide* purchaser. *Held*, that by comity the law of Michigan should prevail and that W.'s right was superior to C.'s. Waters v. Cox, 2 Ill. App. 129. But compare with Hervey v. Locomotive Works, 93 U. S. 664 — an Illinois case, cited below.

In Mershon v. Moors, 76 Wis. 502 (Mershon v. Wheeler, 45 N. W. R. 95), the court gave effect to an unrecorded contract made either in Massachusetts or Connecticut where it was valid, though such contracts in Wisconsin were required to be recorded. See also Collender Co. v. Marshall, 57 Vt. 232.

Under the laws of Kansas a con-

§ 650. —— But where, though the parties reside and the contract is executed in one State, the property is then situated in another State, or is brought into the latter State in pursuance and by virtue of the contract, the law of the latter State is usually held to control with reference to questions thereafter involving it, and if the conditional vendor would preserve his rights in the latter State he must comply with the provisions of its laws.[1]

tract for the sale of personal property by which possession is at once given to the vendees and the title is to remain in the vendors until payment is valid. Where property thus sold in Kansas was removed to Colorado it was held that such contract was enforceable in Colorado, though by the laws of that State compliance with certain conditions was requisite to make such a contract valid. Harper v. People, 2 Colo. App. 177, 29 Pac. R. 1040, distinguishing Wilson v. Voight, 9 Colo. 614, 13 Pac. R. 726. In this case the court said: "It is always essential to ascertain the domicile of the parties, the *lex loci contractus*, and the *situs* of the property. Wherever these unite to sustain the validity of the contract it may be safely asserted that it is enforceable in the courts of every State where a controversy arises over the title to the property. These elements are present in this suit. All the parties to the contract lived in Kansas. By the law of the place of the contract the agreement was a valid one against everybody. The property was within the limits of that jurisdiction when the contract was made. According to the weight of authority the removal of the property into another State, whether with or without the consent of the contracting parties, will not invalidate a contract enforceable when and where it was entered into. A multitude of authorities can be cited upon this question, but we shall content ourselves with the citation of a few well-considered decisions in which the doctrine has been announced. Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 526; Ferguson v. Clifford, 37 N. H. 86; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Cobb v. Buswell, 37 Vt. 337; Smith v. McLean, 24 Iowa, 322; Born v. Shaw, 29 Pa. St. 288, 72 Am. Dec. 633; Crapo v. Kelly, 16 Wall. (U. S.) 610; Thuret v. Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508."

[1] In Hervey v. Locomotive Works, 93 U. S. 664, it is said: "It was decided by this court in Green v. Van Buskirk, 5 Wall. 307; s. c., 7 id. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the

V.

Contracts of Sale Subject to Other Conditions.

§ 651. In general.— It is entirely competent for parties, in making contracts of sale, to subject them to such lawful conditions as they deem material, and where they have done so

transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former." In this case an agreement, called a lease, but held by the court to be a conditional sale, of property to be taken into Illinois, executed by one party in Rhode Island and by the other in New York, was held to be inoperative in Illinois as against creditors in that State because not recorded under the chattel-mortgage act. To like effect: In re Legg (1899), 96 Fed. Rep. 326 [citing Hart v. Manufacturing Co., 7 Fed. R. 543; Pittsburg Locomotive Works v. Keokuk Bank, 19 Fed. Cas. 785; Heryford v. Davis, 102 U. S. 235; Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. R. 999; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. R. 170].

In Cunningham v. Cureton, 96 Ga. 489, 23 S. E. R. 420, it appeared that the vendees, who resided in Georgia, went into Tennessee to purchase certain chattels and there gave their notes for them, which notes contained a clause reserving title in the vendors until payment. The chattels were then shipped to the vendees in Georgia. The law of Georgia required such contracts to be attested and recorded, but the law of Tennessee had no such requirement. The Georgia law was not complied with. In a conflict between the sellers and the holders of liens acquired in Georgia, it was contended that the case was to be governed by the law of Tennessee, but the Georgia court said: "When the property is brought into this State the requirements which our law imposes for the benefit of third persons, as to the attestation and recording of such contracts, are not dispensed with by the fact that it was purchased or is to be paid for in another State."

Though the contract may have been dated in Massachusetts, yet if delivered in Maine, relating to property in Maine, it is to be governed by the laws of Maine. Holt v. Knowlton, 86 Me. 456, 29 Atl. R. 1113.

The law of New Jersey applies to a contract of sale made in New York of property to be delivered to and held by the purchaser in New Jersey. Knowles Loom Works v. Vacher, 57 N. J. L. 490, 31 Atl. R. 306, 33 L. R. A. 305.

The law of Connecticut applies to a contract of sale made and the property delivered in New York, but in contemplation that the property is to be taken to Connecticut, where the contract is to be performed. Beggs v. Bartels (1900), — Conn. —, 46 Atl. R. 874.

But in a late case in New Hampshire it was held that a contract of conditional sale, made in Massachusetts by parties there resident, con

the title will not pass until the condition is performed.[1] It is not practicable, however, to attempt to discuss all such possible contracts. There are, on the other hand, certain kinds of contracts, frequently entered into, which from their nature are necessarily subject to conditions growing out of the essential character of the contract itself, and the most important of these will now be considered.

One of the most important of these is the contract for the —

1. *Sale of Goods "to Arrive."*

§ 652. Such contracts conditioned upon the arrival of the goods.—"A sale to arrive," it is said in one case,[2] is "conditional, and if the article contracted for does not arrive, either

cerning a chattel there situated and valid by its laws, may be enforced in New Hampshire, though the statute of that State has not been complied with; and the fact that the parties, at the time the contract was made, contemplated that the property should be removed to New Hampshire does not alter the rule. Cleveland Mach. Works v. Lang (1892), 67 N. H. 348, 31 Atl. R. 20, 68 Am. St. R. 675. To same effect: Dorntee Casket Co. v. Gunnison (1898), 69 N. H. 297, 45 Atl. R. 318.

Where the seller in Maine sold to a New Hampshire resident a chattel which was removed to New Hampshire, and the statute of Maine required the contract, when executed by a non-resident, to be recorded where the property was when the contract was made (*i. e.*, in Maine), but it was not so recorded in Maine, the contract will not be valid in New Hampshire against a subsequent mortgagee of the goods in that State. Davis v. Osgood (1898), 69 N. H. 427, 44 Atl. R. 432.

[1] Thus, for example, an agreement in a contract for the sale of a saloon, that if no license should be granted there should be no sale, shows that the title is not to pass until the license is procured. Kost v. Reilly (1892), 62 Conn. 57, 24 Atl. R. 519. While, on the other hand, where one agrees that he will purchase a planter if it did not "break all to the devil" before he got through using it, he becomes the purchaser and is liable to pay if the planter does not break as so stipulated. Norton v. Hummel (1887), 22 Ill. App. 194.

A stipulation in an order for a harvester that "if my crops are a failure, and I do not need a machine," justifies the buyer in rescinding if those crops fail for which he would need such a harvester, though his other crops may be good. McCormick Co. v. Williams (1896), 99 Iowa, 601, 68 N. W. R. 907.

[2] Neldon v. Smith, 36 N. J. L. 148, To same effect: Shields v. Pettee, 2 Sandf. (N. Y.) 262; Benedict v. Field, 4 Duer (N. Y.), 154; Dike v. Reitlinger, 23 Hun (N. Y.), 241; Russell v. Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670; Lovatt v. Hamilton, 5 M. & W. 639; Stockdale v. Dunlop, 6 M.

from the vessel's being lost or other cause by accident, and without any fraud or fault of the vendor, the contract is at an end. The contract is executory and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named at a future period when they shall arrive. It is in the nature of a condition and not a warranty."

Stipulations in such contracts as to the time of arrival are therefore construed as fixing a limit beyond which the contract is not to continue, rather than as warranties that the goods shall arrive within that time.[1] The vendor is not liable for the non-delivery of the goods until their arrival, and unless they arrive within the time specified the vendor is not bound to deliver nor the vendee to receive them.[2] So, if the contract be entire, the vendor is not bound to deliver nor the vendee to receive a part of the goods only which arrives within the period fixed.[3]

§ 653. Contracts limiting time of shipment.— It is entirely competent, of course, for the parties to limit the time within which the goods shall be shipped, and when the time is so limited it becomes a condition precedent that they shall be shipped within the time agreed upon; and if not complied with, both parties are released from their respective obligations to deliver and receive.[4]

& W. 224; Johnson v. Macdonald, 9 M. & W. 600; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. R. 276.

[1] Russell v. Nicoll, *supra;* Alewyn v. Pryor, R. & M. 406. In Rogers v. Woodruff, *supra*, it is said: "It has uniformly been held that contracts of this description — for the sale of goods to arrive — are conditional, the words 'to arrive,' or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival," citing many of the cases *supra*.

[2] Hill v. Blake (1884), 97 N. Y. 216.

[3] Russell v. Nicoll, *supra*.

[4] Alexander v. Vanderzee, L. R. 7 C. P. 530; Shand v. Bowes, 1 Q. B. Div. 470; s. c., 2 Q. B. Div. 112; s. c. *sub nom.* Bowes v. Shand, 2 App. Cas. 455.

Where the contract was for five hundred tons of rails to be shipped "from the other side, January or February or March, seller's option," the court said: "It is the settled rule

In construing agreements of this nature it seems to be determined that the expressions in the contract, "to be shipped" or "shipment" within a certain time, have reference, in the absence of usage to the contrary, to the time when the goods shall be placed on board, and not to the time when the shipment shall actually be completed.[1]

§ 654. —— **Giving notice of name of ship.**— It is a common stipulation in these contracts that the vendor shall give the vendee notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this requirement is a condition precedent to his right to enforce the contract.[2]

§ 655. —— **Classification of the cases.**— Mr. Benjamin, after reviewing the English cases in which the question has been much more frequently considered than in the American cases, classifies the decisions as follows:

that in a case like the present the date of shipment is a material element in the identification of the property (Hill v. Blake, 97 N. Y. 216; Tobias v. Lissberger, 105 id. 404). It was not five hundred tons of rails generally that were the subject of the contract, but a specific quantity shipped from the other side during the three named months, and unless such were tendered the contract was not performed. The offer of other rails would impose no obligation upon the purchaser." Clark v. Fey (1890), 121 N. Y. 470, 24 N. E. R. 703.

The destruction of the vessel named before the date of shipment terminates the contract. Nickoll v. Ashton. [1900] 2 Q. B. 298.

[1] Bowes v. Shand, *supra*. A contract to ship goods by railroad on a certain day is satisfied by putting them on the car on that day, although the carrier does not send the car forward until the following day. Clark v. Lindsay (1896), 19 Mont. 1. 47 Pac. R. 102.

[2] Benjamin on Sales, § 588; Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Ex. 709. But where the seller gave the name of the ship as the "Christopher" and the goods arrived on the "St. Christopher," it was held that the refusal of the buyer to receive the goods on that account was unwarranted. Smith v. Pettee (1877), 70 N. Y. 13. So where there was a contract for goods to be shipped from the Philippines in a certain vessel, provided that if she was by any accident unable to load and no other steamer could be procured the contract was to be void, it was held not to preclude reshipment by another vessel at an intermediate point due to an accident to the original vessel. Harrison v. Fortlage (1896), 161 U. S. 57.

First. Where the language is that goods are sold "*on arrival* per ship A or ex ship A," or "*to arrive* per ship A or ex ship A" (for these two expressions mean precisely the same thing), it imports a *double condition precedent*, viz., that the ship shall arrive, *and* that the goods sold shall be on board on her arrival.

Secondly. Where the language asserts the goods to be on board of the vessel named, as "1,170 bales *now on passage*, and expected to arrive per ship A," or other terms of like import, there is a *warranty* that the goods are on board, and a *single condition precedent*, to wit, the arrival of the *vessel*.

Thirdly. The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same which the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him.

Fourthly. Where the sale describes the expected cargo to be of a particular description, as "400 tons of *Aracan Necrensie* rice," and the cargo turns out on arrival to be rice of a different description, and neither party is bound by the bargain.

2. *Sale of Goods "to be Shipped."*

§ 656. Such contracts conditional.—Similar in many respects to the contract for the sale of goods "to arrive," and often associated with it, is the contract for the sale of goods "to be shipped." Such contracts, already slightly touched upon in the preceding subdivision, however, are less conditional than the former, and the condition, like many others to be hereafter noticed, is rather one relating to the performance of the contract than one which goes to the discharge of both parties from it. As will be seen hereafter, whatever in executory contracts goes to the matter of the identification or description of the goods to be supplied, or the time, place, quantity or manner of supplying them, is usually to be deemed a condition

precedent to the buyer's liability; — giving the buyer the option to reject the goods, or to waive the default and accept a substituted performance if he will.[1] It is deemed most convenient, therefore, to leave this question until the subject of delivery is reached,[2] and to confine attention here to those conditions less intimately connected with the mere matter of performance.

3. *Sale on Approval.*

§ 657. Sale if goods are approved.— Contracts are not uncommon in pursuance of which goods are delivered "on trial," or "on approval," to be bought and paid for if the prospective purchaser approves them, and, if not, to be returned.

§ 658. Title and risk pending approval.— Such a transaction does not constitute a present sale, and the title does not pass until in some manner, either expressly or by implication, this necessary approval is manifested.[3] With the title also remains the risk of loss or injury not caused by the buyer's default.[4] Whether the sale is absolute or on approval, in a doubtful case, is a question for the jury.[5]

§ 659. Within what time option exercised.— Where the terms of the contract fix the time within which the option is to be exercised, the contract will, of course, govern; but where no time is so fixed the law will require the determination to be made within a reasonable time.[6]

[1] See *post*, § 1205 et seq.

[2] See *post*, § 1116 et seq.

[3] Hunt v. Wyman (1868), 100 Mass. 198; Dando v. Foulds (1884), 105 Pa. St. 74; Wartman v. Breed (1875), 117 Mass. 18; Fairfield v. Madison Mfg. Co. (1875), 38 Wis. 346; Hall & Brown Mach. Co. v. Brown (1891), 82 Tex. 469, 17 S. W. R. 715; Mowbray v. Cady (1875), 40 Iowa, 604; Glasscock v. Hazell (1891), 109 N. C. 145, 13 S. E. R. 789.

[4] Thus if a horse sold upon approval dies without the fault of the buyer before approval and before the expiration of the time limited, the loss falls on the seller. Elphick v. Barnes (1880), 5 C. P. Div. 321.

[5] Reber v. Schitler (1891), 141 Pa. St. 640, 21 Atl. R. 736.

[6] Washington v. Johnson (1846), 7 Humph. (Tenn.) 468; Hickman v. Shimp (1885), 109 Pa. St. 16.

§ 660. Effect of failure to return within time required.— In either case, while the mere failure to return the goods within the time required may not be *per se* an election to purchase,[1] it is still such evidence that, if unexplained, a conclusive election may be found.[2] Of course, in these cases, there can ordi-

[1] Hunt v. Wyman, *supra.*

[2] Washington v. Johnson, *supra;* Butler v. School District (1892), 149 Pa. St. 351; Hickman v. Shimp, *supra;* Stutz v. Coal Co., 131 Pa. St. 267.

In Aultman v. Theirer (1872), 34 Iowa, 272, a buyer of a reaper was to try the machine for a certain period and give notice if it failed to work as warranted. The buyer gave the notice as required, but continued to use the machine. *Held*, that he lost his right to return it, but could still reduce the recovery by the damages sustained by him.

In Turner v. Machine Co. (1893), 97 Mich. 166, 56 N. W. R. 356, plaintiff sold certain machinery to defendant on trial, trial to cover thirty days. If satisfactory defendant was to pay for it. He failed to give notice at the expiration of the time, and it was held that such failure constituted an acceptance.

In Columbia Rolling Co. v. Beckett Foundry Co. (1893), 55 N. J. L. 391, 26 Atl. R. 888, it was held that where goods are sold subject to approval it is necessary for the purchaser, unless he approves, to express disapproval within a reasonable time, in the absence of which the seller may sue and recover, the failure constituting either an approval or a least at waiver.

In Fairfield v. Madison Mfg. Co. (1875), 38 Wis. 346, plaintiff agreed to take one of defendant's machines, give it a fair trial, and notify defendant if it failed to give satisfaction. The machine was to be settled for after the trial, and taken back if it could not be made to work: but if used more than two days the warranty should be considered fulfilled. The machine did not work and defendant was notified, but plaintiff was prevailed upon to keep the machine with the promise that it would be fixed. It was kept and used part of two seasons, but was nearly useless. *Held*, that title had not passed when plaintiff first notified defendant that the machine did not work. But after plaintiff kept the machine so long it will be presumed that he elected to keep it and sue for breach of warranty.

In Keeler v. Jacobs (1894), 87 Wis. 545, 58 N. W. R. 1107, plaintiffs let the defendant have a machine on trial until satisfied with it, and if not satisfied with it he might return it. Defendant was not satisfied and notified plaintiffs, but he was induced to keep it longer under the promise that plaintiffs' agent would write to plaintiffs and see what could be done. Nothing was done. *Held*, that the question whether defendant had kept the machine more than a reasonable time was for the jury.

In Ellis v. Mortimer (1805), 1 Bos. & P. N. R. 257, plaintiff offered defendant a horse at a certain price, defendant to try it for a month and pay the price if he liked the horse at the price. At the end of two weeks defendant told plaintiff that he liked

narily be no election until an opportunity for inspection or examination has been afforded.[1]

§ 661. Necessity for notice of disapproval.— Ordinarily, and in the absence of a stipulation to the contrary, the party receiving the goods must, in the event of his disapproval, return them or offer to return them or give notice of his disapproval.[2] But the parties may, by their express or implied agreements, dispense with this requirement, and throw upon the person delivering the duty of ascertaining whether the goods are approved or not.[3] If the duty in this respect is not made clear by the terms of the agreement, it becomes a question of fact for the jury to determine whether notice was required from the receiver or not.[4]

§ 662. How notice to be given.— In a case[5] in which the defendants were bound by their contract to give notice of their

the horse but not the price, whereupon plaintiff asked him to return the horse. But defendant kept it ten days longer. *Held*, that he was at liberty to keep the horse for a month if he chose.

[1] Wilson v. Stratton (1860), 47 Me. 120, citing Crane v. Roberts, 5 Me. 419; McCarren v. McNulty, 7 Gray (Mass.), 139; Grout v. Hill, 4 id. 331.

In Hunt v. Wyman, *supra*, a horse taken upon trial had received serious injury without the fault of the bailee before he had a chance to try him, nor, on account of the injury, could the horse be returned within the time specified. *Held*, not a sale. To like effect: Lyons v. Stills (1896), 97 Tenn. 514, 37 S. W. R. 280.

In Kahn v. Klabunde (1880), 50 Wis. 235, it was held that where A takes to his own home a horse belonging to B, intending to purchase it, if satisfactory, with an understanding that he is to use it by way of trial until a specified time, and then, if not satisfied, bring it back to B, or, if too busy for that, to let it stand *unused* till B comes for it, and A continues to use the horse after the time so fixed, but then refuses to buy and offers to return it, this is evidence *for the jury* on the question whether A, at the time so fixed, had determined to retain the horse, and is therefore liable for the price, but it is not conclusive evidence.

[2] Dewey v. Erie Borough (1850), 14 Pa. St. 211, 53 Am. Dec. 533.

[3] In Gibson v. Vail (1881), 53 Vt. 476, it was found that the seller was to come and ascertain whether the other party was satisfied. Such was also the fact in Smalley v. Hendrickson (1862), 29 N. J. L. 371.

[4] Wartman v. Breed (1875), 117 Mass. 18.

[5] Dewey v. Erie Borough (1850), 14 Pa. St. 211, 53 Am. Dec. 533.

dissatisfaction to the plaintiff, Gibson, C. J., said: "They were not bound to follow the plaintiff to a foreign country; but if foreign residence had been alleged, they would have been bound to prove it. If his residence was unknown, they were bound to prove that they had attempted to discover it. If it was known to be in a sister State, they were bound to prove that they had attempted to reach him through the postoffice. But there was not a spark of evidence to prove that any effort had been made whatever, and the contract had become absolute."

4. *Sale if Satisfactory to Buyer.*

§ 663. Sales if buyer is satisfied.— Similar to the questions involved in the last sections are those which arise where the contract is that the buyer shall purchase if the goods are satisfactory. It is entirely competent for the parties to agree that the transaction shall not constitute a sale unless the goods are satisfactory, and where such is the contract no sale takes place until the condition is performed.[1]

§ 664. Who is to be satisfied.— In many of the cases it is expressly stipulated that the sale shall not result unless the buyer is satisfied; but this express stipulation is not necessary. Where a proposition of sale is made to a person upon the con-

[1] It is of course essential that this shall really be the condition. Thus, in Clark v. Rice (1881), 46 Mich. 308, 9 N. W. R. 427, where the contract was that there should be a sale "if, on trial of thirty days, the machine is satisfactory, *or* does what is claimed for it," it was held that the sale was absolute if the machine did what was claimed for it whether the purchaser was satisfied or not. But where the stipulation was that the machine "is to do good work *and* give satisfaction," it was held that the requirement to give satisfaction was an independent one, and that there was no sale unless it gave satisfaction, even though it did good work. Plano Mfg. Co. v. Ellis (1888), 68 Mich. 101, 35 N. W. R. 841.

So, a contract that a machine may be returned if it does not do good work will not justify a return if it does good work, unless the return be assented to by the seller. Manny v. Glendinning (1862), 15 Wis. 50. But a stipulation that a machine may be returned by the purchaser if it does not suit him *and* answer his purpose gives him the right to return it if he is not suited, even though the machine might answer his purpose. Goodrich v. Van Nortwick (1867), 43 Ill. 445.

dition that he need not purchase unless the article is satisfactory, the necessary inference, even in the absence of an express statement, is that he need not buy unless the article is satisfactory to him.[1]

§ 665. If vendee not satisfied there is no sale.— In such cases, if the vendee is in fact not satisfied, there is no sale. It is not enough that he ought to be satisfied, or that the article would be satisfactory to a reasonable man, or that the court or jury deem the article satisfactory.[2] The contract is that the article shall be satisfactory to the vendee himself, and not to some one else.

§ 666. Reasons for his dissatisfaction.— To assign reasons for one's dissatisfaction is not always easy, nor, in these cases, is it ordinarily necessary. In many cases the question is one appealing to taste, sentiment or artistic sensibility, rather than reason; and in such cases, frequently, no reason can be assigned, and none, therefore, is required. If the undertaking is, for instance, to supply a portrait, a photograph, a bust, a suit of clothes, a musical instrument, or an article of furniture, which shall be satisfactory to the other party, "the buyer may reject it without assigning any reason for his dissatisfaction. In such a case the law cannot relieve against the folly of the vendor by inquiring whether the dissatisfaction of the vendee was based upon reasonable grounds or not. It is even doubtful whether it can inquire into the good faith of the vendee's decision."[3]

[1] Singerly v. Thayer (1885), 108 Pa. St. 291, 2 Atl. R. 230; Adams Radiator Works v. Schnader (1893), 155 Pa. St. 394, 26 Atl. R. 745. See also McCarren v. McNulty, 7 Gray (Mass.), 139.

[2] See Singerly v. Thayer, *supra;* Brown v. Foster, 113 Mass. 136; Zaleski v. Clark, 44 Conn. 218; Gibson v. Cranage, 39 Mich. 49; Palmer v. Banfield, 86 Wis. 441, 56 N. W. R. 1090; Osborne v. Francis, 38 W. Va. 312, 18 S. E. R. 591, and many other cases cited in the following notes.

[3] Per Brown, J., in Campbell Printing Press Co. v. Thorp (1888), 36 Fed. R. 414.

In McCarren v. McNulty (1856), 7 Gray (Mass.), 139, the contract was for the construction of a book case, which the plaintiff agreed to finish "in a good, strong and workmanlike manner, to the satisfaction of" one

§ 667. Duty to test goods.— In the cases mentioned in the preceding section, the case cannot ordinarily be made clearer by any test. It would, of course, be the duty of the buyer to examine the article and not to reject it unseen; but there could

of the defendants. It was held that unless the plaintiff showed that the work was satisfactory to or accepted by the defendant in question he could not maintain the action.

Hoffman v. Gallaher (1875), 6 Daly (N. Y.), 42, was the case of a contract to paint the defendant's portrait, it being agreed that the picture should be referred to the defendant's friends, and if they thought it a good likeness he would take it, otherwise he would not. The court held that he was not bound to take it unless his friends liked it, and that it was error to introduce the portrait in evidence and show it to the jury that they might judge of the portrait as a likeness of the defendant.

In the case of Zaleski v. Clark (1876), 44 Conn. 218, 26 Am. R. 446, the plaintiff, who was a sculptor, agreed to make for the defendant a bust of her deceased husband, stipulating that she was not bound to take it unless she was satisfied with it. The bust was completed, was a fine piece of workmanship and an accurate likeness, but from the very nature of the materials was destitute of life-like expression and color. The defendant was not satisfied with it, and would not accept or pay for it; but her dissatisfaction was based upon grounds applicable to all busts. The supreme court said: "Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. . . . In this case the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust is the best thing of the kind that could possibly be produced. . . . A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; an undertaking to make one with which she *will be* satisfied is quite another thing. The former can only be determined by experts. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it."

In the case of Brown v. Foster (1873), 113 Mass. 136, 18 Am. R. 463, the plaintiff had agreed to make a satisfactory suit of clothes for the defendant. They were made and delivered according to agreement, but the defendant was not satisfied with them and refused to accept them. The court held that he was not obliged to do so, for "it is not for any one else to decide whether a refusal to accept is or is not reason-

be no other test than his own convictions or sentiments. There are, however, other cases involving questions of mechanical fitness or adaptability where, from the nature of the case, a test would be required. Thus, if the agreement is to supply a

able, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction."

The rule is further illustrated in the case of Gibson v. Cranage (1878), 39 Mich. 49, 33 Am. R. 351. Here an artist had undertaken to make an enlarged picture from a smaller one, the picture when completed to be one that the purchaser would like and that would be satisfactory to him. The artist made the picture, but the other party was not satisfied with it and would not accept or pay for it. The artist endeavored to ascertain what the objections were, and had the picture changed in some respects. He then endeavored to have the other party examine it again, but he refused to do so, and the artist brought suit. On the trial the defendant looked at the picture and found it still unsatisfactory to him. The plaintiff urged that he was entitled to have the defects pointed out and to be allowed a reasonable time to remedy them. He failed to recover and appealed to the supreme court, but that court affirmed the judgment, and said: "The plaintiff agreed that the picture when finished should be satisfactory to the defendant, and his own evidence showed that in this important particular the contract had not been performed. It may be that the picture was an excellent one and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide this question. Where parties thus deliberately enter into an agreement which violates no rule of public policy and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it. Artists or third parties might consider a portrait an excellent one and yet it might prove very unsatisfactory to the person who ordered it, and who might not be able to point out with clearness or certainty the defects or objections. And if the party giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, he may insist upon his right as given him by the contract."

McClure v. Briggs (1886), 58 Vt. 82, 54 Am. R. 715, was a case in which an organ was sold under the condition that it should be satisfactory to the purchaser. He was distrustful of his own judgment and called in an expert, who told him the tone of the organ was good, but notwithstanding the expert's opinion he still *thought* he was dissatisfied with it. The court said: "If he really *thought* so he *was* so. . . . He was bound to act honestly and to give the instrument a fair trial, and such as the seller had a right, in the circumstances, to expect he would give it, and therein to exercise such judgment and capacity as he had, for by the contract *he* was the one to be satisfied, and not another for him."

In Moore v. Goodwin (1887), 43

machine which will work to the vendee's satisfaction, there is necessarily involved the duty on the part of the vendee to try it reasonably in order to determine whether it will do the work or not, and no arbitrary rejection, without a reasonable test, would be consistent with the vendee's duty.[1] If, however, upon such test, it does not work to his satisfaction, he may decline to buy it; and the fact that others would deem it satisfactory, or that it worked well before or after his test, would be immaterial.[2]

Hun, 534, the defendant contracted to make certain crayon portraits for the plaintiff, not to be accepted unless in all respects satisfactory likenesses. It was held that neither the opposite party nor the jury could decide that he ought to be satisfied with the portraits made.

[1] In Hartford Sorghum Mfg. Co. v. Brush (1871), 43 Vt. 528, the plaintiff sold a patent sugar evaporator to the defendant, who was to try it and pay for it if he liked it, otherwise the plaintiff was to take it back. The court held that the defendant was bound to bring to the trial of it honesty of purpose and judgment according to his capacity to ascertain his wishes, but was not bound to use the care and skill of ordinary persons in making the determination.

Daggett v. Johnson (1877), 49 Vt. 345, was an action in *assumpsit* to recover the price of a number of milk pans. The pans were a patented device for cooling the milk with running water, and the defendant was to pay a certain price if satisfied with them. He used them like ordinary pans for a time and then notified the plaintiffs to take them away and refused to pay for them. The court said: "We think the ruling of the court, that the defendant had no right to say, arbitrarily and without cause, that he was dissatisfied and would not pay for the pans, was sensible and sound. . . . He must act honestly and in accordance with the reasonable expectations of the seller as implied from the contract, its subject-matter and surrounding circumstances. His dissatisfaction must be actual, not feigned; real, not merely pretended."

In Singerly v. Thayer (1885), 108 Pa. St. 291, 2 Atl. R. 230, 56 Am. R. 207, it was claimed that an elevator was rejected as unsatisfactory before it was finished, and the court held that if it was so far incomplete that the purchaser could not reasonably determine whether it was or would be satisfactory to him, his rejection was premature and constituted no bar to the action. See also Exhaust Ventilator Co. v. Chicago, etc. R. Co. (1886), 66 Wis. 218, 28 N. W. R. 343, 57 Am. R. 257.

[2] In Gray v. Central R. Co. (1877), 11 Hun, 70, a contract was made wherein the defendants agreed to take a certain steamboat for a stipulated price, "provided upon trial they are satisfied with the soundness of her machinery, boilers, etc." *Held*, that this wording of the written instrument expressed precisely what both parties meant, and it was im-

§ 668. Duty to act in good faith.— It clearly is the duty of the vendee in these cases, it is said, to act in good faith and with honesty of purpose, and not to express a dissatisfaction which is wholly feigned or simulated.[1] In ordinary cases,

material whether they ought to have been satisfied. Brady, J., dissenting, did "not agree with the proposition that the defendants had a right to declare arbitrarily that they were not satisfied with the soundness of the machinery, etc."

Aiken v. Hyde (1868), 99 Mass. 183, was a case where a machine was sold with the agreement that it should be "entirely satisfactory in all respects" to the vendee, or it might be returned. It was held that the buyer was not bound to give any notice of its failure, and it was immaterial that the machine worked well in the hands of the vendor after being returned to him.

In Clark v. Rice (1881), 46 Mich. 308, 9 N. W. R. 427, the contract of sale contained the provision "if on trial of thirty days the machine is satisfactory, *or* does what is claimed for it." The defendant claimed that he could reject the heater if not satisfactory to him, whether it met the warranty or not. But the court held that the contract very clearly bound him to pay, whether satisfied or not, if the machine did what was claimed for it.

In Wood Reaping, etc. Mach. Co. v. Smith (1883), 50 Mich. 565, 15 N. W. R. 906, the defendant insisted on the stipulation, in addition to the ordinary warranty, that the contract should be of no effect unless the machine worked to the purchaser's satisfaction. The court held that while the cases in which the right of decision is completely reserved to the promisor without liability to disclose reasons "are generally such as involve the feelings, taste or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others," yet "this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option. and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency." The transaction was declared to belong to this class.

Pope Iron and Metal Co. v. Best (1883), 14 Mo. App. 502, was a case where a furnace was sold under the condition that it should "work satisfactorily in melting iron." It was held that the opinions and feelings of the managers of the plaintiff corporation were not, by the contract, made the test, but that the contract, fairly construed, meant that the furnace should work satisfactorily to a reasonable and fair-minded man who was an expert in such matters.

In Singerly v. Thayer (1885), 108 Pa. St. 291, 2 Atl. R. 230, 56 Am. R. 207, it was held that where an elevator was put into a building and "warranted satisfactory in every respect," the fair inference was that the elevator was to be satisfactory to the *purchaser;* and while it could not be rejected arbitrarily, yet a *bona fide* objection by him to its working was a valid defense to the action.

[1] In Baltimore & Ohio R. Co. v.

however, there can be no means of inquiring into the good faith of his purpose, though circumstances may exist which would make it clear; and so far as those cases are concerned which appeal solely to considerations of taste, sentiment or

Brydon (1885), 65 Md. 198, 3 Atl. R. 306, 57 Am. R. 318, the plaintiff contracted to supply the defendant with coal "of such quality as should be satisfactory to defendant's masters of transportation and machinery." It was held that this term of the contract did not give the officers named a capricious or arbitrary discretion to reject it. It was their judgment which was to decide the question of acceptance, but the law required them to exercise a fair, just and honest judgment on the subject. On the question of fraud it was held proper to show what knowledge and means of knowledge they had of the quality of the coal and its fitness for the use intended.

Silsby Mfg. Co. v. Town of Chico (1885), 24 Fed. R. 893. involved the sale of a steam fire engine "subject to the approval of the fire committee," the vendor warranting "the workmanship, finish and performance of the machine satisfactory to them, or the same to be removed without expense." It was held that, in the absence of fraud, it was not enough that the vendees ought to be satisfied; they *must* be satisfied, or they are not bound to accept it.

In Exhaust Ventilator Co. v. Chicago, etc. R. Co. (1886), 66 Wis. 218, 28 N. W. R. 343, 57 Am. R. 257, fans were sold under a warranty that "they will exhaust the smoke and gases in a satisfactory manner." The court held that "if the fans are not honestly and in good faith satisfactory to the defendant, and the defendant notified the plaintiff of that fact in a reasonable time, then and in that case there had been no sale, and the defendant is not liable for the price."

Duplex Safety Boiler Co. v. Garden (1886), 101 N. Y. 387, 4 N. E. R. 749, 54 Am. R. 709, was a case of rebuilding boilers, which were to be paid for as soon as the defendants "are satisfied that the boilers as changed are a success." As soon as the boilers were changed the defendants began to use them and continued to do so. The defendants defended an action for the price on the ground that the question of the success of the boilers was for them alone. But the court held that a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded.

In McCormick Mach. Co. v. Cochran (1887), 64 Mich. 636, 31 N. W. R. 561, a warranty of a machine to give the defendant satisfaction was held to contemplate a reasonable satisfaction. In the case of Seeley v. Welles (1888), 120 Pa. St. 69, 13 Atl. R. 736, the defendant testified that he told plaintiff's agent that he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself. Assuming the truth of this testimony the court held that although his objections may have been ill-founded or even unreasonable, yet if

artistic sensibility, it is, as has been said, doubtful whether the vendee's motives can be questioned.

§ 669. Within what time decision to be made.—The parties may, by their contract, expressly stipulate as to the time within which the decision is to be reached; but if they have

they were made in good faith he had a right to reject the reaper.

A similar conclusion was reached in Platt v. Broderick (1888), 70 Mich. 577, 38 N. W. R. 579, where a machine was sold with the understanding that it would be paid for if it suited the purchaser. The court held that under the agreement it was immaterial whether the machine worked well or not. The defendant was to be satisfied with it, and if it did not suit him he had a right to return it.

In Hawkins v. Graham (1889), 149 Mass. 284, 21 N. E. R. 312, the plaintiff agreed to put a heating plant into defendant's buildings, to be paid for upon satisfactory completion. If not able to heat the buildings "in accordance with the requirements as above set forth," the plaintiff was to remove the machinery at his own expense. But if the heating was satisfactory and conformed to the requirements, the price was to be paid "after such acknowledgment by the owner or the work demonstrated." It was held that the evident intent of these phrases was that the satisfactoriness of the system was to be determined by the mind of a reasonable man and by the external measures set forth in the contract.

In the case of United States Fire-Alarm Co. v. Big Rapids (1889), 78 Mich. 67, 43 N. W. R. 1030, the plaintiff contracted to furnish defendant with a fire-alarm bell, which was to be tested by defendant and accepted if it proved satisfactory. The common council tested it and were not satisfied, and rejected the bell. *Held*, that the common council was not bound to accept it unless satisfied after the test.

In Warder v. Whitish (1890), 77 Wis. 430, 46 N. W. R. 540, the defendant took a binder with the understanding that he could try it and if not suited he could return it at any time. A charge that he might reject it whether it was capable of doing good work or not was approved.

In Howard v. Smedley (1891), 140 Pa. St. 81, 21 Atl. R. 253, the court held that where the plaintiff contracted to erect an elevator in defendant's hotel, to be paid for when "in running order satisfactory to" the defendant, it was not error to enter a peremptory nonsuit upon showing by the plaintiff that the elevator was not running to his satisfaction and that his objections did not arise out of mere caprice.

Osborne v. Francis (1893), 38 W. Va. 312, 18 S. E. R. 591, 45 Am. St. R. 859, was a case where the defendant agreed to take a binder if it worked to his satisfaction. He was not satisfied with it and refused to accept it. There was no written contract, but the court held that the evidence sufficed to show that the buyer expressly reserved the right to reject and send back the machine if on

not, a reasonable time would be implied. In either event the vendee must exercise his right within the time so fixed, and a failure to do so, without reasonable excuse, would furnish strong evidence of satisfaction.[1]

trial it should not be satisfactory to him positively and generally without saying in what respect.

In the case of Jay v. Wilson (1895), 91 Hun, 391, the court held that where a loan is to be made upon a title, provided the title is satisfactory to the attorneys of the lender, the attorneys have no right to refuse arbitrarily or capriciously to be satisfied with the title.

In Crane Elevator Co. v. Clark (1897), 53 U. S. App. 257, 80 Fed. R. 705, 26 C. C. A. 100, an elevator was to be put into a building subject to the satisfaction of the architect. It was held that the decision of the architect was conclusive, but the parties had a right to his independent and honest judgment.

[1] In Wood Reaping, etc. Mach. Co. v. Smith (1883), 50 Mich. 565, 15 N. W. R. 906, the court said of a provision in a warranty calling for immediate notice, in case a machine did not work well, "This provision for immediate notice does not mean the shortest time possible in which notice could be given. The terms must receive a sensible interpretation — an interpretation favorable to the general object and consistent with the surrounding conditions. It would be necessary to make allowance for the engagements of the parties, the distance between them, the facility of communication, and any other incidents having a bearing. No greater dispatch would be implied than such as would be fairly just and reasonable in view of all the circumstances."

Pierce v. Cooley (1885), 56 Mich. 552, 23 N. W. R. 310, was a case where the defendants purchased a machine from the plaintiffs, to be accepted if it worked to defendants' satisfaction, and paid for by a note due May 1, 1884, or by cash payment on that day. The court held that the option to take or reject continued until May 1, 1884, when they were undoubtedly bound to decide. Prior to that date title could not pass without an acceptance by the purchaser.

In Stutz v. Coal & Coke Co. (1889), 131 Pa. St. 267, 18 Atl. R. 875, machinery was sold with the stipulation that it was "to be first class in all particulars, and perform in a satisfactory manner," and thirty days were allowed for trial. But the machinery, while not satisfactory, was retained after the expiration of the thirty days, and the plaintiffs were notified that unless they put it into satisfactory working condition the defendants would have it done at plaintiffs' expense. This, the court held, was an election to keep the machinery.

In the case of Aultman v. Wykle (1889), 36 Ill. App. 293, the defendant bought a machine from the plaintiff with a warranty that it would do good work. Five days were, by the terms of the agreement, allowed for the trial, and if dissatisfied the defendant was to give immediate notice, but if no notice was given within that time and defendant continued to use the machine, it was to be conclusive evidence of satisfaction. *Held*, that an instruction ignoring

§ 670. Duty to give notice or return.— Unless so stipulated in the contract, the vendee is not bound to return the article; he performs his duty when he gives reasonable notice of his dissatisfaction.[1] The contract may, however, require him to return the article, and if it does this provision must be complied with.

§ 671. How buyer's satisfaction indicated.—The fact of the buyer's satisfaction may be established in a variety of ways. There may, of course, be express admissions of the fact; but other forms will suffice. Retention beyond a reasonable time has already been suggested, and a failure to return where that was required. A sale or disposition of the article as one's own would also be evidence, ordinarily conclusive; and so would the fact that the buyer had kept and consumed the article in

the terms of the contract and allowing defendant a reasonable time in which to test the machine was error.

In the case of C. & C. Electric Motor Co. v. Frisbie (1895), 66 Conn. 67, 33 Atl. R. 604, an elevator was put in with the agreement that it should be a satisfactory working machine for one year. It was claimed that this was a condition of the sale and by its express terms gave the plaintiff a year in which to reject. But the court held that such a warranty is not a condition at all; if it were it would be a subsequent, not a precedent, one. Hence there was no error of law in the finding that the plaintiff had, by acts and conduct, accepted the elevator prior to the expiration of the year.

In Forsaith Mach. Co. v. Mengel (1894), 99 Mich. 280, 58 N. W. R. 305, defendants purchased a match machine with the privilege of returning it if not satisfactory. Four months after they were in a position to test the machine, and nearly a year after shipment, the defendants for the first time proposed to return the machine. *Held*, that the delay was clearly unreasonable. The defendants had the option of accepting or rejecting the machine, but they were bound to act promptly, and retention beyond a reasonable time is tantamount to an acceptance.

In Palmer v. Banfield (1893), 86 Wis. 441, 56 N. W. R. 1090, the vendee of a harvesting machine had a right to return it either because of defects or dissatisfaction. He was not satisfied but continued to use it, not as further test but to complete his harvest. *Held*, to constitute an acceptance whereby his right to return was lost.

[1] Esterly v. Campbell (1891), 44 Mo. App. 621 [citing Exhaust Vent. Co. v. Railroad Co., 69 Wis. 454; McCormick Harv. Machine Co. v. Chesrown, 33 Minn. 32; Gibson v. Vail, 53 Vt. 476; Hunt v. Wyman, 100 Mass. 198].

use.[1] A refusal to restore the goods to the seller would have the same effect.[2]

5. *Sale if Approved by Third Person.*

§ 672. Sales upon approval of third person. — But the principle of the foregoing sections, so far as they hold that the question is one for the unlimited arbitrament of the vendee, without inquiry into motives, does not, it is said,[3] "apply, in its unqualified form, in a case where the contracting parties have expressly stipulated that the article to be supplied shall be such, in respect to the quality or otherwise, as shall be approved by or satisfactory to some third person, though that third person may be an agent or an employee of one of the parties to the contract. In such case, though it be made a condition precedent that the article shall be approved by the party designated, yet, if it can be shown that the approval has been withheld from motives of selfish interest, bias, partiality or corruption, the party prejudiced by such action may, notwithstanding the absence of such approval, recover on the contract for the non-acceptance of the article furnished."

§ 673. —— Third person must act in good faith. — "In such contracts it is an implied condition that the person designated to approve shall act with entire good faith to both of the contracting parties. Both parties have the right to insist upon such good faith, and the want of it will dispense with the condition requiring the approval. The court will not allow a defendant to avail himself of the condition precedent to defeat the right of the plaintiff to recover for a violation of the contract, where there has been fraud or *mala fides* on the part of the person appointed to approve or disapprove. But in the absence of fraud or bad faith in the conduct of such party, in respect to the fact of his approval or the withholding of it, his judgment or determination is to be accepted as final and con-

[1] Boothby v. Plaisted (1871), 51 N. H. 436, 12 Am. R. 140; Delamater v. Chappell (1877), 48 Md. 244.

[2] Jones v. Wright (1873), 71 Ill. 61.

[3] Baltimore & Ohio R. Co. v. Brydon (1885), 65 Md. 198, 57 Am. R. 318.

clusive. No mere error or mistake of judgment will vitiate his determination. The very object of his appointment is to prevent and exclude contention and litigation; and hence nothing short of fraud or *mala fides* in the exercise of his power to reject or approve the article contracted for will dispense with the strict legal effect of the condition precedent. This is now the settled doctrine, in respect to this class of contracts, in the courts both of this country and of England."[1]

[1] Baltimore & Ohio R. Co. v. Brydon, *supra* [citing Wilson v. Y. & Md. Line R. Co., 11 G. & J. (Md.) 58; Lynn v. Baltimore & Ohio R. Co., 60 Md. 404, 45 Am. R. 741; Sweeney v. United States, 109 U. S. 618; Martinsburg v. Potomac R. Co., 114 U. S. 549; Sharpe v. San Paulo R. Co., L. R. 8 Ch. App. 597].

Wood was purchased, to be measured and received by the quartermaster at Walla Walla. *Held*, that title did not pass until such measurement and receipt by the quartermaster at Walla Walla. Rosenthal v. Kahn (1890), 19 Oreg. 571, 24 Pac. R. 989. A ship-builder agreed to alter, fit for sea and deliver a gun-boat as a merchant vessel, under the inspection and subject to the approval of a third person who was experienced in ship-building. *Held*, that the third person named was made an arbitrator between the parties, and his approval was binding upon them as an award, however much he may have erred in his judgment. Flint v. Gibson (1871), 106 Mass. 391.

Plaintiff was the vendor of a device to be used in boilers for the purpose of saving fuel. Defendant agreed to take one provided that upon trial it made a saving of twelve per cent., and his engineer was to be the judge of its performance. The test was made and the engineer's decision rendered to the effect that it saved more than the required amount. *Held*, that this decision of defendant's engineer "is to be considered as the award of a referee under a submission to arbitrate. In the absence of any suggestion of fraud, this award cannot be impeached on the ground of any error in judgment on his part." Robbins v. Clark (1880), 129 Mass. 145. Defendant purchased meat from plaintiffs, of a stipulated kind and quality, and appointed an inspector, with plaintiffs' approval, to pass upon it as satisfying the terms of the contract. The meat was inspected and approved by the inspector, and put upon the cars for shipment, but defendant refused to take it. Accordingly it was sold by plaintiffs and action brought for damages. *Held*, that the substance of the agreement was that the defendant would accept such meat, when delivered, as had been inspected and pronounced in conformity with the terms of the contract. In the absence of fraud the purchaser was as much bound to receive the meat as though he had inspected and approved it in person. Nofsinger v. Ring (1879), 71 Mo. 149.

But where a contract was made for the delivery of about sixty thousand blocks of granite according to certain directions, provided that if

6. *Sale of Goods to be Appraised.*

§ 674. Title does not pass ordinarily until appraisal.— It has been seen in an earlier chapter[1] that it is competent for the parties to contract for the sale of goods at a price which shall be fixed by some third person specified or to be agreed upon, and that, when the price is so fixed, it becomes operative between the parties as though they had themselves determined it.

But in order that such a contract of sale shall operate to pass the title, it is, in general, essential that the price shall be fixed as provided in the agreement; for if the parties fail to agree upon the valuer, or if the latter fails or refuses to act, the contract, if executory, must lack an essential element, and the title will not pass,[2] unless a contrary intention appears, even though the failure to procure the appraisal was due to the default of one of the parties.[3] Where, however, the goods have been delivered, and the vendee has prevented the valuation, as by consuming or disposing of the goods before the value was fixed, he will be liable for their reasonable value.[4]

7. *Sale or Return.*

§ 675. Sale with option to return or pay.— To be distinguished from the cases in the last sections are those in which the option is the opposite, *i. e.*, that the article is purchased and shall be paid for unless it be returned.

at any time, in the judgment of defendants' engineer, plaintiff was manifestly unable to furnish the blocks as required, then the trustees might declare the contract null and void, the court held that the question of the ability of the contractor to furnish the stone did not rest exclusively with the engineer, but that a jury might properly consider whether, under the circumstances, the engineer had any sufficient justification for his decision adverse to the plaintiff. Connecticut Valley, etc. Co. v. Trustees (1898), 32 App. Div. (N. Y.) 83.

[1] See *ante*, §§ 202, 203.

[2] Fuller v. Bean (1857), 34 N. H. 290; Hutton v. Moore (1870), 26 Ark. 382.

[3] Thurnell v. Balbirnie (1837), 2 Mees. & Wels. 786; Vickers v. Vickers (1867), L. R. 4 Eq. 529; Milnes v. Gery (1807), 14 Ves. 400; Wilks v. Davis (1817), 3 Meriv. 507.

[4] Clarke v. Westrope (1856), 18 Com.

§ 676. —— Here there is a present sale subject to a condition subsequent.— As is said in one case:[1] "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

This is directly in line with cases already considered in a previous section when treating of deposits of grain, in which it was found that a sale existed whenever the owner had conferred upon the other party the option to determine whether to pay for the article in money or property as he should elect.[2]

§ 677. Nature of title acquired by vendee — Risk of loss.— A contract of this nature, as has been seen, constitutes usually a present sale subject to be defeated by a condition subsequent. Until return, therefore, the title is in the vendee. He may sell the goods as his own,[3] and thus defeat the return; or they may be seized by his creditors,[4] with like effect. The risk usually is his also, as the risk follows the title,[5] excepting, perhaps, such

B. 765, 86 Eng. Com. L. 764; Humaston v. Telegraph Co. (1873), 20 Wall. (U. S.) 20; Kenniston v. Ham (1854), 29 N. H. 501.

[1] Hunt v. Wyman (1868), 100 Mass. 198. To same effect: McKinney v. Bradlee (1873), 117 Mass. 321; Foley v. Felrath (1893), 98 Ala. 176, 13 S. R. 485; Wind v. Iler (1895), 93 Iowa, 316, 61 N. W. R. 1001, 27 L. R. A. 219; Strauss Saddlery Co. v. Kingman (1890), 45 Mo. App. 208; Jameson v. Gregory (1863), 4 Metc. (Ky.) 363; Johnson v. McLane (1845), 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Walker v. Blake (1854), 37 Me. 373; Allen v. Maury (1880), 66 Ala. 10; Robinson v. Fairbanks (1886), 81 Ala. 132; House v. Beak (1892), 141 Ill. 290, 30 N. E. R. 1065, 33 Am. St. R. 307.

If a person engaged in the manufacture and sale of soda-water delivers it in bottles to a customer, and takes a deposit from him with the understanding that he may return the bottles and take back the deposit, or keep the bottles and regard the deposit as a payment, as he may elect, such a transaction amounts to a sale of the bottles at the election of the purchaser. People v. Cannon (1893), 139 N. Y. 32, 34 N. E. R. 759, 36 Am. St. R. 668, distinguishing Westcott v. Thompson (1858), 18 N. Y. 363.

[2] See *ante*, § 34.

[3] Dearborn v. Turner (1839), 16 Me. 17, 33 Am. Dec. 630; McKinney v. Bradlee (1873), 117 Mass. 321.

[4] Martin v. Adams (1870), 104 Mass. 262; Hotchkiss v. Higgins (1884), 52 Conn. 205, 52 Am. R. 582.

[5] As where goods are destroyed by

risks as inhere in the very nature of the property or are incidental to the tests or other acts which the contract gives the buyer the right to perform.[1]

fire before return (Strauss Saddlery Co. v. Kingman (1890), 42 Mo. App. 208; Foley v. Felrath (1893), 98 Ala. 176, 13 S. R. 485); or a horse dies. Carter v. Wallace (1884), 32 Hun (N. Y.), 384.

[1] In Carter v. Wallace, *supra*, the court said: "The plaintiff was the owner of the horse, and it is admitted that he delivered it into the possession of the defendant. While in the possession of the defendant the horse was taken sick, and died within one day thereafter. The parties had negotiations concerning the sale of the horse, which resulted in the delivery of the horse as stated. The plaintiff claims that the negotiations resulted in a complete and absolute sale of the property at the price of $130, and that the same was delivered in pursuance of the bargain, with the privilege on the part of the defendant to return the same if, on trial, she did not drive to suit him. If such was the agreement, then the title to the property passed to the vendee, and, until an election is made to return the property, it is at the risk of the purchaser, and in case of any loss or injury to the property it will fall on the purchaser." But in Head v. Tattersall (1871), L. R. 7 Exch. 7, Head bought a horse of Tattersall, warranted to have hunted with the Bicester hounds. By a condition of the contract he might return the horse. if it did not answer the description, at any time up to the Wednesday evening following the sale. Before he took the horse away, Head heard that the horse had not hunted with the hounds, which afterwards proved to be the fact; but he took it with him, and while on the way to Head's stable the horse became frightened without Head's fault, became unmanageable, and was seriously injured. Within the time agreed upon Head returned the horse to Tattersall, who denied his obligation to receive it back in its injured condition, and Head sued to recover back the price paid, and he was held to be entitled to recover. Bramwell, B., said: "It is said the right to return was lost because the rule is that a buyer cannot return a specific chattel except it be in the same state as when it was bought. That is quite true as a general proposition, but in such a case as the present the rule must, in my opinion, be qualified thus: The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable, either from its inherent nature, or in the course of the exercise by the buyer of those rights over it which the contract gave. . . . No doubt some cases which may be put by way of illustration present difficulties, but they can all be explained if the condition is borne in mind that the right to return remains, in case of alteration of condition, only where that alteration is attributable either to the horse's nature or to some inevitable accident, or to some incident to which the horse was liable, while the buyer was exercising his right over it under the contract. Thus, where a buyer, who has bought a horse not warranted to jump, tries it at jumping, and so injures it, it is

§ 678. Option usually vendee's only — Security of seller.— The option, moreover, is the vendee's, and the seller has no lien or title reserved by virtue of which he can enforce a return if the goods are not paid for.[1] As will be seen, the vendor's security "rests in the contract."

Thus in one case[2] it appeared that the plaintiff had delivered to one Nason a cow, taking Nason's written promise to return the same cow within a year with a calf by her side, or to pay $22.50. Before the year had expired Nason sold the cow and calf to defendant, from whom plaintiff sought to recover them. Said the court: "We are very clear that the security of the plaintiff rested in contract, and that, Nason having the alternative to return or pay, the property passed to him and he was at liberty to sell the cow." In another case[3] in the same court it is said: "Whether the alternative is to return specifically or in kind, or specifically or to pay a certain sum, the principle is the same. The property in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect. He may do what he will with the article received. If he pays, he fulfills his contract. If he neither pays nor returns,

clear his right of return would be gone, because the accident would be his own fault. He would not be trying the horse by virtue of any right given to him under his agreement. If, however, the injury were caused by reason of a trial necessary to test the warranty the horse was sold under, then the right would remain. The case of a horse dying was also put to us. But there, if the death occurs through some natural disease, or without the purchaser's default, is he to be without a remedy? It may be answered that he might have his action on the warranty. However that may be, I am disposed to think that even in such a case the contract might still be rescinded, just in the same way as I think it could be if the horse sold were to be left at the vendor's by his permission after the sale and were to die there." The other judges expressed no opinion on what would have been the result had the horse died.

Where the horse is sold on approval and dies without the fault of the vendee, the loss falls on the seller. Elphick v. Barnes (1880), 5 C. P. Div. 321. Compare also Smith v. Hale (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485.

[1] McKinney v. Bradlee (1875), 117 Mass. 321; Dearborn v. Turner (1839), 16 Me. 17, 33 Am. Dec. 630.

[2] Dearborn v. Turner, *supra*.

[3] Buswell v. Bicknell (1840), 17 Me. 344, 35 Am. Dec. 262.

he is liable to an action." Numerous other cases illustrate this rule, many of which are cited in the note.[1]

§ 679. —— **Stipulations reserving title.**— Contracts in this general form may, nevertheless, be made conditional. Thus, the parties may stipulate that, until the buyer has determined whether he will purchase or return, the title shall continue in the seller, and this reservation is effectual.[2] These cases, however, are properly to be classed among the cases of sale upon approval.

[1] In Buswell v. Bicknell (1840), 17 Me. 344, 35 Am. Dec. 262, a cow had been delivered to a person who was to pay $16 for her by the 4th of the following April or return the cow and pay $4 for her use. *Held*, a sale. In Holbrook v. Armstrong, 10 Me. 31, cows had been delivered to be returned or paid for at the end of two years. *Held*, a sale. In Southwick v. Smith, 29 Me. 228, hides had been delivered and a note given for the amount, with an agreement that if the note was not paid the leather made from the hides should be returned. *Held*, a sale. See also Perkins v. Douglas, 20 Me. 317. In Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118, it is said: "The general proposition that a delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving, to pay for or return the goods received, the uniform current of authorities is that such alternative agreement is a sale."

Where goods are shipped from one State to another under a contract that the vendee is to pay for them unless within thirty days he finds they are not as represented, it is a sale of the goods in the first State. Schlesinger v. Stratton, 9 R. I. 578.

So in Wind v. Iler (1895), 93 Iowa, 316, 61 N. W. R. 1001, 27 L. R. A. 219, where plaintiffs bought liquors from defendants, paid the freight on them and credited defendants immediately upon the receipt of the goods, with the understanding that they might return the goods if, after test, they were not of the quality ordered, it was held that there was a completed sale, title passing when goods were delivered to the carrier for transportation, with an option in plaintiff to return them if they did not meet the required test. Called a "sale or return" in contradistinction from a conditional sale.

In Hotchkiss v. Higgins (1884), 52 Conn. 205, 52 Am. R. 582, an innkeeper sent to a wholesale liquor dealer an order for liquors named, saying that he wanted it for a certain occasion, and "what is used I account for and ship rest back to you." *Held*, that the title passed to the innkeeper so that the goods were liable to his creditors, and that evidence that neither party intended this result was inadmissible.

[2] Thus, for example, see Crocker v. Gullifer (1858), 44 Me. 491; Mowbray v. Cady (1875), 40 Iowa, 604; Wright v. Barnard (1893), 89 Iowa, 166, 56 N. W. R. 424.

§ 680. **Form of option.**— The option in these cases usually is that if the buyer does not like, or is not satisfied with, the goods he may return them; and where this is the stipulation the option of the buyer is absolute, and the reasons for his action are not to be investigated.[1] But, on the other hand, the stipulation may not give the buyer so absolute an option. Thus, for example, if the contract is that a machine may be returned if it will not do good work, the right to return it will depend upon that fact.[2] But if the contract is that the machine may be returned if it does not suit the buyer *and* answer his purpose he may return it if he is not suited, though it might answer his purpose.[3] Many other cases might be suggested, but the question ordinarily presents itself as one aspect of a warranty, and further illustrations will be deferred until that subject is considered.[4]

§ 681. **Within what time option to be exercised.**— Contracts of this nature are usually specific and fix the time at or within which the option is to be exercised; but here, as in the former cases, where no time is fixed by the contract, a reasonable time will be presumed by the law.[5] Hence,—

§ 682. **Effect of not returning in time required.**— The failure of the party receiving them, without reasonable excuse, to return the goods within the time specified, unless such return be waived or the time extended, makes the sale absolute,[6]

[1] Goodrich v. Van Nortwick (1867), 43 Ill. 445.

[2] Manny v. Glendinning (1862), 15 Wis. 50. Though if the seller unconditionally receives the goods back he will acquiesce in the rescission and cannot raise the question of performance.

[3] Goodrich v. Van Nortwick, *supra*. Compare the very similar cases in Michigan: Clark v. Rice, 46 Mich. 308, 9 N. W. R. 427, and Plano Mfg. Co. v. Ellis, 68 Mich. 101, 35 N. W. R. 841.

[4] See *post*, § 1222 et seq.

[5] Moss v. Sweet, 16 Q. B. 493; Childs v. O'Donnell (1891), 84 Mich. 533, 47 N. W. R. 1108; Schlesinger v. Stratton, 9 R. I. 578; Columbia, etc. Co. v. Beckett (1893), 55 N. J. L. 391, 26 Atl. R. 888; Gale Mfg. Co. v. Moore (1891), 46 Kan. 324, 26 Pac. R. 703; Luger Furniture Co. v. Street (1897), 6 Okl. 312, 50 Pac. R. 125.

[6] Stevens v. Hertzler (1895), 109 Ala. 423, 19 S. R. 838.

In House v. Beak (1892), 141 Ill. 290, 30 N. E. R. 1065, 33 Am. St. R. 307,

and the price may be recovered as for goods sold and delivered.[1] *A fortiori* is the sale absolute where the party expressly refuses to return the goods.[2]

plaintiffs were wholesale merchants, who sold goods to defendants to be disposed of at retail, only such goods as were sold by defendants to be paid for, the rest to be returned. The defendants kept the goods for more than three years without offering to return them. *Held*, that the property in the goods passed at once to the purchaser, subject to his option to return them within a reasonable time. The goods were not returned within a reasonable time and defendants are therefore liable as upon an absolute sale.

In Buckstaff v. Russell & Co. (1897), 49 U. S. App. 253, 25 C. C. A. 129, 79 Fed. R. 611, the purchasers of machines, under a contract authorizing rescission if they were dissatisfied after a fair and honorable trial, sought to defend an action for the price on the ground of rescission, though they had used the machines for three and one-half years after their alleged notice to the seller. *Held*, that their conduct was a waiver of the contract right of rescission.

In Waters Heater Co. v. Mansfield (1875), 48 Vt. 378, defendants bought a steam heater from plaintiff, agreeing to attach it to their works and try it for thirty days. If it proved satisfactory they were to pay for it or return it. They did not attach it, but waited to see how another of plaintiff's heaters which they knew about would work. *Held*, that such keeping it was an election to purchase.

In Spickler v. Marsh (1877), 36 Md. 222, a party agreed to take machinery on trial. If it suited him he was to pay for it; if it did not he was to return it. He neither returned it nor expressed any dissatisfaction. *Held*, that the seller might treat the transaction as an absolute sale. Called by the court "a sale or return."

In Prairie Farmer Co. v. Taylor (1873), 69 Ill. 440, appellee sold a printing press to appellant with the agreement that he was to keep and use it thirty days, appellee to keep it in order, "to determine whether the warrant [to give complete satisfaction] is good, and whether you will keep the press or not." *Held*, that if the purchaser kept the machinery thirty days without notice of his election not to keep the same, he was responsible for the price. "The sale was complete unless the company determined not to keep it."

In Thomson-Houston Electric Co. v. Brush-Swan Co. (1887), 31 Fed. Rep. 536, plaintiff sold and delivered to defendant certain machinery for electric lighting, to be set up by defendant and paid for thirty days after successful operation. *Held*, that the evidence "tends to show such a transaction as would pass the property in

[1] Moss v. Sweet (1852), 16 Q. B. 493, 71 Eng. Com. L. 493; Schlesinger v. Stratton (1870), 9 R. I. 578; Jameson v. Gregory (1863), 4 Metc. (Ky.) 363; Bianchi v. Nash (1836), 1 M. & W. 545; Beverley v. Gas Co. (1837), 6 A. & E. 829, 33 Eng. Com. L. 434.

[2] Jones v. Wright (1873), 71 Ill. 61.

§ 683. How when party puts it out of his power to return. Where the party receiving the goods has put it out of his power to return them within the time agreed upon, the sale becomes absolute.[1] Thus, where a horse had been delivered to be paid for or returned within a specified time, and the party receiving it so abused it that it was materially injured and lessened in value, the court said: "The sale was on a condition subsequent, that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant in the meantime disabled himself from performing the condition — and if the horse was substantially injured by the defendant by such abuse he would be so disabled,— then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an *indebitatus assumpsit* without setting out the conditional contract."[2]

the goods themselves," and defendant's failure to set up and test the machinery cannot defeat plaintiff's action for the price.

In Snody v. Shier (1891), 88 Mich. 304, 50 N. W. R. 252, a harvesting machine was purchased under the condition that it should be returnable if defective, but the return must be before the harvesting season was over. It was kept till the next season for a further trial with the vendor's consent. *Held*, that the vendor waived the condition as to return.

In Colles v. Swensberg (1892), 90 Mich. 223, 51 N. W. R. 275, plaintiffs supplied defendants with a boiler filter to be returned within one year if unsatisfactory. Defendants notified plaintiffs that it was unsatisfactory, and asked for shipping directions, but they were not sent. *Held*, that plaintiff waived the condition for reshipment.

[1] Ray v. Thompson (1853), 12 Cush. (Mass.) 281, 59 Am. Dec. 187. A loan attended with a continuous offer of sale at a fixed price may be converted into a sale at any time before the offer is withdrawn. And a sale by the borrower to a third person signifies that the offer is accepted. Windsor v. Cruise (1887), 79 Ga. 635, 7 S. E. R. 141.

[2] Ray v. Thompson, *supra*. But this rule was held not to apply where the horse, within the time limited, was injured without the vendee's fault and returned in such injured condition. Head v. Tattersall (1871), L. R. 7 Ex. 7. A sale of personal property on condition that the vendee may return it in a certain contingency becomes absolute if the vendee disables himself from returning it by selling or mortgaging the property. In re Ward's Estate (1894), 57 Minn. 377, 59 N. W. R. 311.

§ 684. How when return becomes impossible.— The same result ensues where the return, without the fault of the seller, has become impossible. Thus where goods sold, subject to the right of the vendee to return certain of them if he liked, were delivered to a common carrier for transportation to the vendee, but were lost in transit, it was held to be a case of present sale subject to a condition subsequent, and that the loss must fall upon the vendee.[1]

But in an English case,[2] already cited, where a horse was sold with the right to return it if it did not conform to the description, one of the judges said: "As a general rule, damage from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault."

§ 685. How return effected — Tender — Effect.— The right of the vendee to return the goods, under the conditions agreed upon, is an absolute one, and upon such return the title vests again in the seller.[3] A stipulation for such a return, it is usually held, "does not amount in law to a contract to repurchase, but is, upon the exercise of the option, a rescission of the contract, and the title at once vests in the original vendor."[4]

[1] Foley v. Felrath (1893), 98 Ala. 176, 13 S. R. 485, 39 Am. St. R. 39. In Scroggin v. Wood (1893), 87 Iowa, 497, 54 N. W. R. 437, a stallion was sold with a warranty that he was an average breeder, but it was expressly agreed that the test should not be considered complete until he had been used two years. The vendees were to bear all risk of accident and disease while the horse was in their possession. The horse died in four months. *Held*, that the loss was on the vendees, for there could be no breach of warranty before the time for making the test had elapsed.

[2] Head v. Tattersall (1871), L. R. 7 Ex. 7, cited *supra*.

[3] Laubach v. Laubach (1873), 73 Pa. St. 387; Gay v. Dare (1894), 103 Cal. 454, 37 Pac. R. 466.

[4] Gay v. Dare, *supra*. In Laubach v. Laubach, *supra*, Sharswood, J., said: "No one has ever supposed

If the vendor refuses to receive back the goods, a tender of them establishes the vendee's right,[1] and he may hold the goods for the vendor.[2] But if the vendee acquiesces in the vendor's refusal to receive them, no restoration of the title will be effected.[3]

8. *Sale with Option in Vendor to Retake.*

§ 686. Title in vendor until option exercised.— In previous sections[4] exhaustive discussion has been had of the so-called conditional sale in which the vendor, while parting with the possession, has retained the title as security for the price; and it has there been seen that no title passes to the vendee until the condition has been performed or performance has been waived.

But it is entirely competent for the parties to make an arrangement which shall reverse these conditions, namely, that the title shall at once pass subject to an option on the part of the seller to subsequently reclaim the goods for reasons specified. Until this right has been exercised, the title is in the vendee, and he may convey an indefeasible title to a *bona fide* purchaser,[5] or the goods may, it is said, be seized to satisfy the vendee's creditors.[6]

that this was to be construed as a contract to repurchase, or that upon the exercise by the vendee of the option reserved, the title does not revest in the original vendor, and the right to the price in the vendee. This is the legal effect of the rescission of a contract, whether the rescission be by reason of an inherent vice, such as fraud, or by virtue of the terms of the contract itself. Smethurst v. Woolston, 5 W. & S. 106."

[1] Gay v. Dare, *supra;* Laubach v. Laubach, *supra;* Thorndike v. Locke (1867), 98 Mass. 340.

[2] Gay v. Dare, *supra.*

[3] Stevens v. Cunningham (1862), 3 Allen (Mass.), 491. Here a steam engine and boiler were sold as of a certain power; part payment was made, and it was agreed that if they did not prove of the power specified the vendor was to take them back and repay the money, in default of which the vendee might sell them. They proved inefficient, but the vendor refused to take them back. Later the vendee rented them to the vendor, who mortgaged them. *Held,* that the title was in the vendee.

[4] See *ante,* §§ 558–650.

[5] See *ante,* § 146.

[6] Moline Plow Co. v. Rodgers (1894), 53 Kan. 743, 37 Pac. R. 111.

§ 687. **Waiver of option.**— And where the option is reserved for the purpose of securing the payment of the purchase price, and as an alternative to action for its recovery, a suit for the price will be deemed to be such an election of remedies as will preclude the subsequent retaking of the goods.[1]

9. *Sale with Right in Vendor to Repurchase.*

§ 688. **Title in vendee until right exercised.**— There may also be contracts of present sale reserving to the seller the right to repurchase the goods upon terms agreed upon. In practice it is difficult often to determine whether a given contract having some of these aspects constitutes a pledge, a mortgage, a sale conditioned to be void upon the payment of a certain sum, or a sale with the privilege of repurchase. This is a difficulty to be dealt with in view of the terms of the contract, the circumstances of the case and the evident intention of the parties.[2] If it be found to constitute a present sale with a privilege of repurchase, the title passes at once, subject to the right of the seller to regain it upon complying with the conditions.[3]

§ 689. **Such contracts strictly construed.**— "Such defeasible purchases," it has been said,[4] "though narrowly watched, are valid, and are to be taken strictly as independent dealings between strangers; and the time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost." "There is good reason," it is said again, in commenting upon this rule,[5] "why such sale should be 'narrowly watched' and 'precisely observed.' There is no

[1] Moline Plow Co. v. Rodgers, *supra*.

[2] See Eiland v. Radford (1845), 7 Ala. 724, 42 Am. Dec. 610; Hickman v. Cantrell (1836), 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; Murphy v. Barefield (1855), 27 Ala. 634; Swift v. Swift (1860), 36 Ala. 147; Com. v. Reading Savings Bank (1884), 137 Mass. 431.

[3] Lucketts v. Townsend (1848), 3 Tex. 119, 49 Am. Dec. 723.

[4] 4 Kent's Com. 144.

[5] Beck v. Blue (1868), 42 Ala. 32, 94 Am. Dec. 630. See also Slowey v. McMurray (1858), 27 Mo. 113, 72 Am. Dec. 251; Sewall v. Henry (1846), 9 Ala. 24.

obligation on the part of the vendor to repurchase. Should the property appreciate in value, he may exercise his right and realize the profit; should it depreciate in value, or be injured or destroyed, he may decline to repurchase, and permit the loss to fall exclusively on the vendee.[1] Such being the relative situation of the two parties to such a contract, the law requires promptness and precision on the part of the vendor in the assertion of his right to repurchase, especially when the vendee pays a fair valuation for the property."

§ **690. Within what time right exercised.**— Where the terms of the contract fix the time within which the vendor shall repurchase, that time must be observed;[2] if no time is so fixed, a reasonable time at least will be implied.[3]

§ **691. Interests in goods before repurchase.**— The title thus being in the vendee subject only to the seller's privilege of repurchase, the goods are not liable for the seller's debt,[4] and a *bona fide* purchaser from the vendee would obtain a perfect title.[5]

10. *Sale to be Void if Vendor Pays.*

§ **692. Such agreements valid.**— There may also be a present sale subject to a condition that the transfer shall be void in case the seller pays to the buyer a sum specified, as where upon

[1] See Com. v. Reading Savings Bank (1884), 137 Mass. 431, 443.

In Moore v. Sibbald (1869), 29 Up. Can. Q. B. 487, there was the following agreement: "I, S., give $20 to M. for the colt which I have in possession; but I, said S., promise to give back the colt to M. if he will pay the same sum with 12% interest, on or before May 1, 1866. If not paid the colt will be S.'s property, then he can do with it as he likes or keep it for himself." M. paid S. $15, but failed to pay the balance, and in September, 1867, S. sold the colt; whereupon M. brought trover. *Held*, a contract of sale with privilege of repurchase, and not a mortgage; and plaintiff not having paid in time had lost his right; but plaintiff was held entitled to a return of the $15.

[2] Moore v. Sibbald (1869), 29 Up. Can. Q. B. 487.

[3] Beck v. Blue (1868), 42 Ala. 32, 94 Am. Dec. 630.

[4] Mahler v. Schloss (1877), 7 Daly (N. Y.), 291.

[5] See *ante*, § 146.

the sale of a slave there was indorsed upon the bill of sale, absolute in its terms, the following: "N. B. If the above-bound P. pay up to the above-named M. the sum of four hundred dollars within twelve months from the date hereof, the above bill of sale to be void, and the negro boy returned."[1]

These are true conditional sales, *i. e.*, sales upon condition subsequent, and are practically equivalent to those considered in the preceding subdivision. They are entirely valid,[2] though there is constantly difficulty in distinguishing them from chattel mortgages. "A mortgage and a conditional sale are nearly allied to each other, and it is frequently difficult to say whether a particular transaction is the one or the other. The difference between them is that the former is a security for a debt, and the latter is a purchase for a price paid or to be paid, to become absolute on a particular event; or a purchase accompanied by an agreement to resell upon particular terms. It is the latter kind that runs so nearly into a mortgage. . . . Courts lean toward considering them mortgages."[3]

11. *Sale to be Void if Vendee Does Not Pay.*

§ 693. Such agreements valid.— And finally, there may be, as has been already noticed,[4] cases of present sale coupled with a condition subsequent that the sale shall be void in case the purchaser does not pay. These cases are rare,— the usual form being that, already fully discussed, of contracts of sale upon the precedent condition that the title shall not pass until the price is paid.

[1] Poindexter v. McCannon (1830), 1 Dev. (N. C.) Eq. 373, 18 Am. Dec. 591.

[2] See Poindexter v. McCannon, *supra;* Eiland v. Radford (1845), 7 Ala. 724, 42 Am. Dec. 610; Logwood v. Hussey (1877), 60 Ala. 417; Haynie v. Robertson (1877), 58 Ala. 37; Peeples v. Stolla (1876), 57 Ala. 53; Magee v. Catching (1857), 33 Miss. 672; Pierce v. Scott (1881), 37 Ark. 308.

[3] Poindexter v. McCannon, *supra.* See also Weathersley v. Weathersley (1866), 40 Miss. 462, 90 Am. Dec. 344; Morrow v. Turney (1859), 35 Ala. 131; Bishop v. Rutledge (1832), 7 J. J. Marsh. (Ky.) 217; Hart v. Burton (1832), 7 J. J. Marsh. 322.

[4] See *ante,* § 572.

Such sales upon condition subsequent are, however, valid as between the parties, though the seller runs the risk of losing his claim if the goods are seized by the creditors of the vendee or sold by him to a *bona fide* purchaser before condition broken.[1]

[1] See Murch v. Wright (1868), 46 Ill. 487, 95 Am. Dec. 455; Lucas v. Campbell (1878), 88 Ill. 447; Gerow v. Castello (1888), 11 Colo. 560, 19 Pac. R. 505, 7 Am. St. R. 260 [though see Jones v. Clark (1894), 20 Colo. 353, 38 Pac. R. 371]. See also Vincent v. Cornell (1832), 13 Pick. (Mass.) 294; Day v. Bassett (1869), 102 Mass. 445; Currier v. Knapp (1875), 117 Mass. 324; Newhall v. Kingsbury (1881), 131 Mass. 445.

CHAPTER IV.

OF CONTRACTS RESPECTING EXISTING CHATTELS NOT YET IDENTIFIED.

§ 694. Purpose of this chapter.

I. Contracts for Sale of Portion of Ascertained Mass.

695. Before title can pass the goods must be ascertained.
696. Method of identification immaterial.
697. Contracts respecting part of a mass of unequal constituents.
698. —— These cases form class by themselves.
699–702. —— Essential features of cases of this class.
703. —— How when whole mass delivered to vendee.
704. Contracts respecting part of a mass of like constituents.
705. —— Intention material.
706. —— Usage may affect.
707–709. —— How question affected by usage.
710. How when no usage governs.
711, 712. —— *Kimberly v. Patchin* as a type.
713. —— Cases holding separation necessary.
714, 715. —— *Scudder v. Worster* as a type.
716, 717. —— The weight of authority.

II. Contracts for Sale of Goods of Certain Kind but Goods Not Yet Identified.

718. Nature of subject.
719. Under what circumstances question arises.
720. What to be included here.

1. *Of Appropriation in General.*

§ 721. General necessity for appropriation.
722. What meant by appropriation.
723. Who interested in question.
724, 725. Who may make the appropriation.
726. What constitutes appropriation in general.
727. —— Appropriation consists of acts, not mere intention.
728. —— Acts must be in fulfillment of contract.
729. Assent to the appropriation.
730. —— Buyer's assent made necessary by terms of contract.
731. —— Buyer's assent required by implication — Sale by sample.
732. —— How buyer's assent given when required.

2. *Of Appropriation when Seller is to Deliver Goods.*

733. How when seller is to select and deliver the goods.

3. *Of Appropriation where Buyer is to Come for Goods.*

734. How when buyer is to come and get the goods.
735. —— Effect of putting goods into buyer's conveyance.

4. *Of Appropriation where Seller is to Send Goods by Carrier.*

736–739. How when seller is to send goods by carrier.
740. Intention governs.

§ 741. —— Payment of freight as evidence.
742. —— Agreement that goods shall not be paid for unless they arrive.
743–745. —— Further of the intention.
746. Goods must be sent in conformity with order.
747. Due care must be used in shipping.
§ 748. —— Remedy over against carrier must be preserved.
749. —— Duty to insure.
750. What constitutes delivery to the carrier.

5. *Of Appropriation where Goods Consigned on Account of Previous Advances.*
751, 752. How when goods consigned on account of previous advances.

§ 694. Purpose of this chapter.— Having in the preceding chapters dealt with unconditional contracts respecting specific chattels, and also with conditional contracts respecting specific chattels, there remains now to be considered such contracts as may be made for the sale of chattels which, while they are in existence, have not yet been ascertained and identified as the particular ones to which the contract is to apply.

Of contracts of this general kind there are two chief classes, viz:

I. Contracts for the sale of a portion of an ascertained mass of goods.

II. Contracts for the sale of chattels of a certain kind, which, however, have not yet been set apart, identified, or otherwise "appropriated" to the contract.

Somewhat analogous to the contracts of the latter class are contracts which contemplate the manufacture or production of a chattel of the kind agreed upon in the contract, and which, when manufactured or produced, is to be supplied in pursuance and performance of that contract. Undertakings of this nature will be reserved for treatment in the following chapter.

I.

Contracts for the Sale of a Portion of an Ascertained Mass.

§ 695. Before title can pass the goods must be ascertained. As has been already seen,[1] it is absolutely indispensable to a

[1] See *ante*, § 198.

completed sale that the chattel which is the subject of the sale shall be ascertained and identified. The minds of the parties must meet in reference to some specific chattel, or otherwise there will remain but a mere agreement to sell, which has yet to be applied to some specific chattel in order to consummate the sale. As is said by Bigelow, C. J., "Until the parties are agreed as to the specific, identical goods, the contract can be no more than an agreement to supply goods of a certain kind or answering a particular description. The reason of this is obvious. There can be no transfer of property until the parties have ascertained and agreed upon the articles sold. Before they are designated and set apart in some form, there is nothing to which the contract of sale can attach or on which it can operate." [1]

§ 696. **Method of identification immaterial.**— The method of accomplishing the identification is immaterial; the fact is the essential thing. The contract itself may afford the necessary means of identification, or that result may be left to be determined by subsequent acts or events; but until in some way the chattels are identified, no title can pass.[2]

§ 697. **Contracts respecting part of a mass of unequal constituents.**— When the contract is for the sale of a portion to be selected from a mass made up of constituents of different kinds, weights, quantities or values, it is obvious that the title cannot ordinarily pass until the particular portion which is the subject of the contract has been distinguished from the heterogeneous mass, unless, perhaps, in the case of a contract for the sale of a portion to be taken from the mass of constituents "as

[1] Gardner v. Lane (1865), 9 Allen (Mass.), 492, 85 Am. Dec. 779, citing Aldridge v. Johnson, 7 El. & B. 885; Scudder v. Worster, 11 Cush. (Mass.) 573.

[2] In Joseph v. Braudy, 112 Mich. 579, 70 N. W. R. 1101, it appeared that there was a written contract for the sale of four lots of iron, two of which, the contract recited, had been identified by the parties, but the other lots were not identified in any way. In replevin by the vendee for the whole amount, it was held that the contract was entire, that the third and fourth lots had not been identified, and that no title to any part of the iron passed.

they run," as the saying is,— a question which would be germane to that to be considered in the following section.

§ 698. —— **These cases form a class by themselves.**— It will be obvious, upon reflection, that cases of the kind now under consideration form a class by themselves distinct from those to be considered in the following section where the mass is made up of constituents exactly alike and concerning which there can be no choice and hence no object, other than mere separation, to be subserved by selection. Yet the cases now under consideration are often treated as identical with those yet to be considered, thereby greatly increasing the conflict as to that class, which is certainly sufficiently complicated without them.

§ 699. —— **Essential features of cases of this kind.**— The essential features of this class are unlike constituents from which there is not only *separation* but *selection* to be made; of the other class, similar constituents from which a portion is to be *separated.*

§ 700. ——. Thus where the contract was for the sale of two hundred cords of hard wood out of a pile containing between three hundred and fifty and four hundred cords of hard and soft wood mixed, it was held that there was no sale completed until the two hundred cords of hard wood had been selected from the pile. "It was a bargain," said the court, "for a parcel yet to be measured out of a larger parcel of various qualities, and of an extent not determined."[1]

§ 701. ——. So where one man, having in the possession of another a large number of barrels of flour varying in value from twenty-five to fifty cents a barrel, agreed to sell six hundred barrels to a third person, and gave him an order for them on the depositary, it was held that no title to the six hundred barrels passed until they were selected.[2]

[1] Hahn v. Fredericks (1874), 30 Mich. 223, 18 Am. R. 119.

[2] Woods v. McGee (1836), 7 Ohio, part II, 127, 30 Am. Dec. 202. The court, it is true, do not place the case upon the particular ground stated in

§ 702. ——. Again, in a very recent case,[1] where a contract was made for the sale of one hundred and sixty-two thousand merchantable brick out of a kiln, it was held that no title passed, notwithstanding payment of the price, until they had

the text, but this was evidently a feature of the case, and this ground is ascribed to it in the later case of Newhall v. Langdon (1883), 39 Ohio St. 87, 48 Am. R. 426. Mr. Ralston in his monograph, p. 32, says that Woods v. McGee was overruled by Newhall v. Langdon, but this is clearly an error, for, in the latter case, the court, referring to the former case, say: "The *distinction* between that case and the one at bar is so manifest that, even conceding the correctness of the principles stated by the learned judge independent of any usage on the subject, *and it is unnecessary* to question them, they do not control in the case." And after stating two other grounds of distinction, the court says: "3d. The flour varied in price, and therefore in marketable quality, *and in all such cases there is to be a selection before the title passes.*" (The italics are mine. M.)

[1] Anderson v. Crisp (1892), 5 Wash. 178, 31 Pac. R. 638, 18 L. R. A. 419. In this case it was said by Dunbar, J.: "It is contended by the appellants that the determining question in this case is whether a sale of personal property constituting a part of a large mass of like property passes title to the purchaser until it is separated from the mass, or in some other way designated or distinguished; and appellants' brief on this proposition is elaborate and painstaking, and would greatly aid the court in investigating this question, did we deem its determination necessary in this cause. The question presented by appellants is a new question in this state, and is an exceedingly important one; and in consideration of its importance, and in consideration of the fact that the authorities are so conflicting, we deem it advisable not to decide it until such decision is necessary to the determination of the cause at issue. We say this because, conceding the force of appellants' argument, this cause, we think, must be distinguished from the cases cited which sustain the rule contended for by appellants, that it is not necessary to separate or distinguish a portion of personal property from the mass which includes it, to pass title to the portion sold. All those cases are based on the supposition that all the different portions of the mass are of equal value and of uniform quality, so that there is nothing left to be done by either party but to weigh, measure or count, which acts involve no discretion; that the intention of the parties to the contract is the only thing to be considered, and that, when it can be definitely determined from the terms of the contract that the intention of the parties was to pass the title, the title is held to pass. Or, in other words, we presume they mean to say that, while the separation from the common mass is a circumstance going to show the intention of the parties to pass the title, it is not an essential circumstance. Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334, is the leading case supporting this rule, and has received much criticism,

been selected, inasmuch as it was shown that the brick in the kiln were not all merchantable, and that selection had to be exercised in order to determine those which were of the kind designated. The same conclusion as to the necessity

both favorable and adverse, by courts and text writers. There it was held, upon a sale of a specific quantity of grain, that its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested. In that case it will be noticed that the goods were indistinguishable in quality or value, and it was upon that particular state of facts that the argument of the court was based. 'It is,' said the court, 'a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to the other, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore are capable of exact identification.' But the court with great force proceeds to argue that other character of property, such as grains, wines, oils, etc., which are not susceptible of definite description, are not subject to this rule, but that the title to such property can be held to pass by contract without separation or manual delivery, if nothing further remains to be done in regard to it. But it must be admitted that if all the property in the mass is not of equal value something more does remain to be done. Thus, in the case at bar, another element is injected into the contract, and there is a question of relative values to be yet determined. The appellants did not buy a portion of an indistinguishable mass, where all the component parts were of equal value; but their contract called for one hundred and sixty-two thousand merchantable brick; and the evidence was that the brick that were deemed unmerchantable were thrown aside and not counted in when they came to haul them. So that it is impossible to determine, before the segregation of the brick, not only what particular brick were sold, but what relative portions of the kiln were sold. And while, as we have said before, it may be conceded that the intention of the parties will be carried into effect if it can be ascertained, yet under this contract it is impossible to ascertain not only the particular brick sold, but the actual relative number of brick sold, by reason of the unsettled question of what brick were and what were not merchantable, creating an element of uncertainty in the contract which does not exist in those cases where the vendor sells a certain number of bushels of grain or a certain number of gallons of oil or tons of hay, in an undivided mass, where all the different portions are of equal value. We think to hold that the title passed in this case would be carrying the principles of liberal construction beyond the rule laid down in any of the cases cited by appellants. It is true that some of them were brick cases, similar in

of selection was reached in an important case where there was an agreement to sell a large number of hams which were a part of a still larger mass of different weights and value, and there was no separation, setting apart or marking so as to distinguish those in question from the residue. The court, however, put its decision upon the broad ground that separation is required to pass the title, even when the constituents of the mass are identical.[1] Many other cases of the same kind might be given, but those already stated will sufficiently illustrate the principle, and further examples will be given in the notes.[2]

most respects to the case at bar, but in none of them did it appear that the brick in the kiln were not of uniform and equal value; and all the American cases were decided on the strength of Kimberly v. Patchin, *supra*, and the principles upon which that case was based are thus stated by Mr. Ralston, who is an earnest advocate of what he terms 'the new rule:' 'When the constituent parts which make up a mass are indistinguishable from each other by any physical difference in size, shape, texture or quality, and the quantity and general mass from which it is to be taken are specified, the subject of the contract is sufficiently ascertained, and the title will pass, if the sale is complete in all its other circumstances.' Plainly, the case at bar does not fall within those principles.

"This being our view of the law covering this particular case, and there being no conflict in the testimony concerning the fact that it was only merchantable brick that were sold, the appellants could not have been injured by the instruction complained of; for they would not have been entitled to a verdict in any event. Reaching this conclusion renders unnecessary the investigation of the other questions raised." Appellants cited Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Jackson v. Anderson, 4 Taunt. 24; Pleasants v. Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726; Waldron v. Chase, 37 Me. 414, 59 Am. Dec. 56; Lamprey v. Sargent, 58 N. H. 241; Chapman v. Shepard, 39 Conn. 413; Damon v. Osborn, 1 Pick. 476, 11 Am. Dec. 229; Gardner v. Dutch, 9 Mass. 427; Weld v. Cutler, 2 Gray, 195; Hutchison v. Com., 82 Pa. St. 472; Morgan v. King, 28 W. Va. 1, 57 Am. R. 633; Newhall v. Langdon, 39 Ohio St. 87, 48 Am. R. 426; Carpenter v. Graham, 42 Mich. 191, 3 N. W. R. 974; Wagar v. Railroad Co., 79 Mich. 648, 44 N. W. R. 1113; Young v. Miles, 20 Wis. 646; Hurff v. Hires, 40 N. J. L. 581, 29 Am. R. 282; Howell v. Pugh, 27 Kan. 702; Davis v. Budd, 60 Iowa, 144, 14 N. W. R. 211; Galloway v. Week, 54 Wis. 604; Watts v. Hendry, 13 Fla. 523; Horr v. Barker, 11 Cal. 393, 70 Am. Dec. 791; Long v. Spruill, 58 N. C. 96; Morrison v. Woodley, 84 Ill. 192; Ralston on Sales of Undivided Interests in Pers. Prop., pp. 21–58.

[1] Ferguson v. Northern Bank of Kentucky, 14 Bush (Ky.), 555, 29 Am. R. 418.

[2] In Austen v. Craven (1812), 4 Taunt. 644, the contract was for the

§ 703. —— How when whole mass delivered to vendee.— Before leaving this branch of the subject, notice should be made of a class of cases (analogous to others already considered in

sale of fifty hogsheads of sugar of different weights to be taken from the stock, no particular hogsheads being specified and the weight not being capable of ascertainment until they were selected and weighed. *Held*, that the title did not pass. In White v. Wilks (1813), 5 Taunt. 176, there was a bargain for twenty tons of oil, to be taken from various tanks and cisterns of the vendor not specified. *Held*, no title passed. In Busk v. Davis (1814), 2 M. & S. 397, the bargain was for ten tons of hemp out of a stock, lying in mats of unequal quantities, of about eighteen tons. In order to get the ten tons it was necessary to weigh the mats and possibly to divide a mat. *Held*, that the title did not pass.

In Hutchinson v. Hunter (1847), 7 Barr (Pa. St.), 140, there was a bargain for one hundred barrels of molasses "of unequal contents and unequal value, part of a specified larger stock." These were not separated, marked or otherwise agreed upon. *Held*, no title passed. So, in Foster v. Mining Co. (1888), 68 Mich. 188, 36 N. W. R. 171, where iron ore in a pile with worthless material was bargained for to be selected from the residue; and in Cass v. Gunison (1888), 68 Mich. 147, 36 N. W. R. 45, where $3,000 worth of lumber was contracted for out of any one of three grades, no title passed till selected.

Foot v. Marsh (1873), 51 N. Y. 288, was also a case of this kind, and the court distinguished it from the class of cases considered in § 704.

In Dunkart v. Rineheart (1883), 89 N. C. 354, where a vendor agreed to sell to the vendee "any of my black walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference and under ten feet, at $2 each; and all trees measuring ten feet in circumference and upwards, at $2.50 each," it was held that if there were more than fifteen such trees on the land the contract was ineffectual to pass title to any.

In Warren v. Buckminster (1852), 24 N. H. 336, and Robbins v. Chipman (1876), 1 Utah, 335, it was held that where a designated number of sheep were sold from a flock, but not selected, no title passed. Latter case affirmed on rehearing, 2 Utah, 347. So in Williams v. Feiniman (1875), 14 Kan. 288, where certain liquors were sold to be supplied out of the stock of the vendor.

In Block Bros. v. Maas (1880), 65 Ala. 211, a bill of sale purported to convey the whole of a stock of merchandise, "reserving and excepting the amount of $1,000 worth of said merchandise, personal property, which is hereby selected by me, as a resident of said State, as exempt to me under the laws of Alabama, and which personal property, to the amount of $1,000, is not hereby conveyed." *Held*, to be only an executory agreement until the vendor has selected the portion reserved as exempt.

Pierson v. Spaulding (1888), 67 Mich. 640, 35 N. W. R. 699, was a case very similar to the last, where there was a sale of a stock of goods excepting and reserving from the stock whatever it might inventory above $4,500, and it was held that the title

another place[1]) which hold that even where selection, as distinguished from mere separation, is required before the title can pass, the identity of the goods may be sufficiently determined to allow the passing of the title by a delivery of the whole mass to the purchaser with authority to make the selection for himself. Thus, in a recent case,[2] all the hard brick in a certain kiln had been bargained for, to be selected by the purchaser from the kiln, which contained two kinds; but as the whole mass was turned over to the purchaser to enable him to make his selection, it was held that the title passed.[3] "In the case of a sale of a part of an entire mass of goods," said the court, "if the purchaser is allowed to take possession of the whole, for the purpose of selecting his part, the title to that part passes before selection."

§ 704. Contracts respecting a part of a mass of like constituents.— The question of the necessity of the separation

could not pass until the vendor had taken out the goods excepted and reserved.

In Steaubli v. Bank (1895), 11 Wash. 426, 39 Pac. R. 814, where a contract of sale was drawn for a certain number of shingles stored with others in a mill dry room, the court said that the lack of proof of any uniform character or value of all the shingles stored together went to show that no title had passed.

[1] See *ante*, § 525.

[2] Lamprey v. Sargent (1878), 58 N. H. 241.

[3] Weld v. Cutter (1854), 2 Gray (Mass.), 195, and Damon v. Osborn (1823), 1 Pick. (Mass.) 476, 11 Am. Dec. 229, were cited by the court. In Weld v. Cutter there was a mortgage of a part of a large quantity of coal, but the mortgagee, with the assent of the mortgagor, took possession of the whole pile "for the purpose of separating and securing his part," and it was held that the title passed.

Crofoot v. Bennett, 2 N. Y. 258, was like this case. There a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee that he might take the quantity bought. *Held*, that the title had passed to the number sold.

In Iron Cliffs Co. v. Buhl (1879), 42 Mich. 86, two thousand tons of a certain grade of iron ore were purchased, to be delivered at the railroad docks at Erie and carried to the purchasers by the railroad company. More than the quantity sold was delivered at the docks, all of the same grade, and nothing remained but to take the two thousand tons from the common mass and forward them to the purchasers, it being understood by the parties that the railroad company would see to that business. *Held*, that the property passed to the purchasers when the ore was delivered at the docks.

and identification of a part bargained for out of a larger mass made up of ingredients of the same kind, value and amount presents serious difficulties and has involved the courts in what has been thought to be a hopeless conflict of authority. It is believed, however, that much aid can be derived here also from discrimination.

§ 705. —— **Intention material.**— It must be constantly kept in mind that courts are more and more inclined, and properly, to give effect to the intention of the parties; and this intention, if it can be ascertained and is not inconsistent with the general policy of the law, will be held conclusive even though a different result might be required under the older rules laid down by the courts for the very purpose of aiding in the discovery of intention. "The tendency of the modern decisions," it is said in a leading case,[1] "is to give effect to contracts of sale according to the intention of the parties to a greater extent than is found in the older cases, and to engraft upon the rule that the property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of the parties."

§ 706. —— **Usage may affect.**— It must also be noticed that the demands of modern business have given rise to usages for the speedy and convenient transaction of business which were unknown in earlier times and which sanction methods of dealing with which earlier generations were not familiar. Parties who deal in a field or about matters in reference to which such an usage is known to prevail, presumptively make it a part of their contract. "In all questions involving contract relations," says Chief Justice Johnson, of Ohio, "the convenience and wants of business give rise to usages which become part of the contract, where it is made with reference to such usages. This is often called the expansive property of the common law, but it is rather the application of accepted prin-

[1] Hurff v. Hires (1878), 40 N. J. L. 581, 29 Am. R. 282.

ciples of right and justice, as evidenced by common law, to new phases and methods in the transaction of business."[1] Now, applying these rules to the question in hand, it may first be noticed that —

§ 707. —— **How question affected by usage.**— In reference to many commodities presenting always substantially like characteristics of form, nature and value, such as wheat, corn, oil, flour, and the like, it has become common to mingle together different bulks in one general mass and to draw from the bulk, when needed, similar quantities, without regard to whether the identical particles contributed were returned or not. It has also become common to deal with orders, warrants or receipts for articles so mingled as though they were the articles themselves.

§ 708. ——. Thus, in a leading case[2] it appeared that A had one hundred barrels of flour in the custody of a warehouseman. He sold fifty barrels to B, and twenty-five barrels each to C and D, giving each one an order for his flour upon the warehouseman. These orders were presented to the warehouseman and accepted by him. It was held that the title passed without separation. Said the court: "In view of the nature of this particular business, in the case at bar, and the known usage

[1] Newhall v. Langdon (1883), 39 Ohio St. 87, 48 Am. R. 426.

[2] Newhall v. Langdon (1883), 39 Ohio St. 87, 48 Am. R. 426. The court further said: "We hold that upon the facts found by the court, showing the well known usage of the business, it is manifest that upon the presentation and acceptance of this order the sale was completed, and the subsequent loss of the flour while stored at the depot must fall on the purchaser. Steel Works v. Dewey, 37 Ohio St. 242; Young v. Miles, 23 Wis. 643; Cloud v. Moorman, 18 Ind. 40; Horr v. Barker, 8 Cal. 603; Cushing v. Breed, 14 Allen (Mass.), 376, 92 Am. Dec. 777; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Waldron v. Chase, 37 Me. 414, 59 Am. Dec. 56; Chapman v. Shepard, 39 Conn. 413; Whitehouse v. Frost, 12 East, 614. Also notes to Hurff v. Hires, 11 Vroom (40 N. J. L.), 581, 29 Am. R. 282; 17 and 18 Am. Law Reg. 18, 161, in which the whole subject is exhaustively discussed and the cases reviewed." To the same effect: Inglebright v. Hammond (1850), 19 Ohio, 337, 53 Am. Dec. 430; McPherson v. Gale (1866), 40 Ill. 368; Warren v. Milliken (1869), 57 Me. 97.

governing buyer and seller, we think it clear that as between them by the delivery of the order from the seller, by the purchaser to the warehouseman, and his acceptance of the same, the right to the fifty barrels of flour was perfected in the purchaser, and that thereafter it became his property. It is true there were one hundred barrels out of which the order was to be filled, but it was all of the same quality, and by the known usage the only delivery to be made by the seller was by an order on the warehouseman, which when presented entitled the purchaser to separate and remove the property. No selection, properly speaking, had to be made, as all the barrels were alike, but only a counting off and separation; and in this respect it differs from those cases where it is the intention of the parties that there is to be a selection or designation out of the larger quantity."

§ 709. ——. So it has been held that a valid pledge may be made of a portion of a mass of wheat in a storehouse by the delivery of the receipt, without separating the wheat pledged from the residue. "For the convenient transaction of the commerce of the country," said Cooley, J., "it has been found necessary to recognize and sanction this mode of transfer, and vast quantities of grain are daily sold by means of such receipts."[1]

§ 710. How when no usage governs — Cases holding separation unnecessary. — But there still remains a large class of cases in which no usage prevails or which have been determined without reference to usage. These are cases in which a person, who continues in possession, undertakes to sell a given portion of a larger mass of goods of the same kind and quality, and the question is whether the title to such portion can pass before the goods in question have been separated from

[1] Merchants', etc. Bank v. Hibbard (1882), 48 Mich. 118, 11 N. W. R. 834, 42 Am. R. 465, citing Gibson v. Stevens, 8 How. (U. S.) 384; Cushing v. Breed, *supra;* Broadwell v. Howard, 77 Ill. 305; Gregory v. Wendell, 40 Mich. 432. See also Carpenter v. Graham, 42 Mich. 191; Watts v. Hendry, 13 Fla. 523.

the larger mass. Upon this question the authorities seem hopelessly in conflict.

§ 711. —— Kimberly v. Patchin as a type.— One line of cases, of which *Kimberly v. Patchin*[1] is a leading and important one and typical of the whole class, holds that the title may

[1] Kimberly v. Patchin (1859), 19 N. Y. 330, 75 Am. Dec. 334. The court refer with approval to Whitehouse v. Frost (1810), 12 East, 614; Jackson v. Anderson (1811), 4 Taunt. 24, and Pleasants v. Pendleton (1828), 6 Rand. (Va.) 473, 18 Am. Dec. 726. White v. Wilks, 5 Taunt. 176, and Austen v. Craven, 4 Taunt. 644, were distinguished. In Whitehouse v. Frost, D. & B., who had forty tons of oil in a cistern, sold ten tons to F., who sold it to T., giving him an order for it on D. & B., who accepted the order by indorsement upon it. *Held*, that the property had passed, as between F. and T. This, says Mr. Benjamin, is a case "which, notwithstanding explanations by the judges in subsequent cases, is scarcely even mentioned without suggestion of doubt or disapproval." In Jackson v. Anderson, F. had remitted to L. & Co. four thousand and seven hundred Spanish dollars and advised plaintiffs that one thousand nine hundred and sixty of these were designed for them. L. & Co. pledged the whole number to defendant, who sold them to the Bank of England. *Held*, that, though plaintiffs' dollars had not been separated from the others, yet as the defendant had converted the whole number, trover would lie for the plaintiffs' share. In White v. Wilks there was a sale of twenty tons of oil out of the seller's stock, which was in different warehouses and cisterns. There was no specification of the bulk from which the twenty tons were to be taken. *Held*, that no title passed. In Austen v. Craven the sale was of a quantity of sugar of different kinds at a given price per hundred-weight. It did not appear that the seller at the time of the contract had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. *Held*, that no title passed.

Prior in date to Kimberly v. Patchin is Pleasants v. Pendleton, *supra*, which is often cited as the leading case upon this side of the question. In that case there was a contract for the sale of one hundred and nineteen barrels of flour out of a lot of one hundred and twenty-three of like kind stored in the warehouse of a third person. An order on the warehouseman for the flour was delivered to the purchaser and he gave the seller a check for the price. The flour would have been delivered to the purchaser if called for on the day of purchase (though the contract was not completed till late in the afternoon), but it was burned by accidental fire the following morning. It was held that the title had passed, though the court laid much stress upon the fact that there was a well-defined usage to make a constructive delivery by the transfer of warehouse receipts or orders.

Where the owner of a quantity of corn in bulk sells a certain number of bushels therefrom and receives his pay, and a vendee takes away a part,

pass under such circumstances if that appears to have been the intention of the parties. In the case referred to, it appeared that one D. had a quantity of wheat in his warehouse which he and one S. estimated at six thousand bushels. D.

the property in the part sold vests in the vendee, although it has not all been measured or separated from the heap. Waldron v. Chase, 37 Me. 414. (Compare with Morrison v. Dingley (1874), 63 Me. 553, cited in following note.)

In Young v. Miles (1866), 20 Wis. 646, the plaintiff was owner of a certain quantity of wheat which was stored in mass with that of others in a warehouse. Shipments were made from the mass until it was reduced to an amount no greater than that which plaintiff had deposited with the warehouseman, and replevin for this was sustained. The court based their decision on the general principle as laid down in Kimberly v. Patchin. Downer, J., preferred to allow the action on the theory of segregation, as laid down in Horr v. Barker, 6 Cal. 489, but the chief justice, speaking for the court, said he could see no difference between the doctrine of segregation and the right of separation, except that the latter was the more fundamental.

In Clark v. Griffith (1862), 24 N. Y. 595, plaintiff's assignors had purchased from the defendants four billiard tables of equal value, giving in payment therefor certain notes and a chattel mortgage upon the tables. The agreement was that as fast as the amounts paid on the notes should cover the prices of the tables, receipts in full for them were to be given by the vendors, and such a receipt in full for *one* table had been given prior to this action. Default having been made in the payment of subsequent notes, the defendants foreclosed the mortgage, and took all the tables under it, alleging that since no particular table had been appropriated by the purchasers, no title had passed to them. But the court held, following Kimberly v. Patchin, that just as the plaintiff's assignors, while they had the tables in their possession, had the right at any time to take distinct possession of one of them, so the vendors, when they came to foreclose their mortgage, had the same right to select out three tables unless the purchasers had already selected: and since the defendants, in seizing under foreclosure, must have taken the tables one at a time, the first three tables taken must be held to have been selected by them, and the title to the last was in the purchaser.

And in Minnesota the court said that "while there is some confusion and conflict among the authorities on the subject, yet it is settled in this State that where a certain number of articles are sold out of a greater number of exactly the same kind and quality, with the intention that the title should presently pass, and where the vendee has the absolute right at any time to take the amount or number out of the whole mass or quantity, this is sufficient to pass the title, although the specific articles are not actually designated or separated from the remainder. Under such circumstances, until the separation is made, the vendor and vendee

gave to S. a written instrument by which he made a present transfer to S. of six thousand bushels of wheat. D. also gave to S. a warehouse receipt for the wheat, declaring that he had received in store six thousand bushels of wheat subject to the order of S. D. afterward sold the same wheat to other parties, and, upon measurement, it was found that the whole quantity in the warehouse at the time of the dealings with S. was six thousand two hundred and forty-nine bushels. The defendants claimed title through S. and had obtained possession of the wheat by replevin. The plaintiffs claimed title through the second purchaser. It was held that the title passed to S.

§ 712. ——. After discriminating between chattels of unlike kinds, "distinguishable by their physical attributes from all other things," and masses of property made up of particles of like kind and nature, such as oil, wheat, flour, and the like, the court, per Comstock, J., say, referring to the latter kind: "Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass if the sale is complete in all its other circumstances. An actual delivery, indeed, cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual deliv-

are tenants in common of the whole according to their respective interests." MacKellar v. Pillsbury, 48 Minn. 396, 51 N. W. R. 222; Nash v. Brewster, 39 Minn. 530, 41 N. W. R. 105 [wherein Kimberly v. Patchin *supra;* Russell v. Carrington, 42 N. Y. 118; Lobdell v. Stowell, 51 N. Y. 70; Chapman v. Shepard, 39 Conn. 413; Hurff v. Hires, 40 N. J. L. 581, are cited and relied upon].

To like effect: Watts v. Hendry, 13 Fla. 523; Piazzek v. White, 23 Kan. 621; Bailey v. Long (1880), 24 Kan. 90; Phillips v. Ocmulgee Mills, 55 Ga. 633; Hires v. Hurff (1876), 39 N. J. L. 4; Smith v. Friend (1860), 15 Cal. 124; Aderholt v. Embry (1884), 78 Ala. 185; Crapo v. Seybold (1876), 35 Mich. 169 (considered again in 36 Mich. 444); Kaufmann v. Schilling (1874), 58 Mo. 218; Hoyt v. Insurance Co., 26 Hun, 416; Andrews v. Smith (1884), 34 Hun, 20; Rodee v. Wade (1866), 47 Barb. 53.

In Cloke v. Shafroth (1891), 137 Ill. 393, 27 N. E. R. 702, 31 Am. St. R. 375, this rule is said to be supported by the weight of American decisions.

ery is not indispensable in any case in order to pass a title if the thing to be delivered is ascertained, if the price is paid or a credit given, and nothing further remains to be done in regard to it. . . . It is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract, and all parts are of the same value and undistinguishable from each other."

§ 713. —— **Cases holding separation necessary.**— There is, on the other hand, a line of cases holding that under such circumstances the intention is not sufficient and that no title will pass until the particular goods agreed upon have been separated from the mass of which they form a part. To use the language of Chief Justice Gibson in such a case: "Without separation, intention is nothing." Of these —

§ 714. —— **Scudder v. Worster as a type.**— *Scudder v. Worster*[1] may be selected as a type. There the defendants had entered into a contract with S. T. & Co. to sell to the latter

[1] Scudder v. Worster (1853), 11 Cush. (Mass.) 573. Speaking of Pleasants v. Pendleton, the court say: "In reference to this case, Grimke, J., in Woods v. McGee, 7 Ohio, 127, 30 Am. Dec. 202, says: 'It is impossible to divest ourselves of the impression that the small difference between the aggregate mass and the quantity sold, the former being one hundred and twenty-three barrels and the latter one hundred and nineteen, may have influenced the decision. It was a hard case, and hard cases make shipwreck of principles.'" Jackson v. Anderson, 4 Taunt. 24 (*supra*), was cited and distinguished upon the grounds that the point was not raised at the trial and that the defendant had disposed of *all* of the dollars, the action being trover. Gardner v. Dutch, 9 Mass. 427, was also distinguished if not disapproved. In that case plaintiff had had in his possession a large number of bags of coffee, the proceeds of a voyage he had made for W. & R., and he had an interest in the coffee for his compensation. On an accounting his interest was determined to be seventy-six bags, and he delivered the entire quantity to W. & R., taking from them their receipt "for seventy-six bags of coffee, . . . which we hold subject to his order at any time he may please to call for the same." All of the coffee was attached as the property of W. & R., and plaintiff

two hundred and fifty barrels of pork out of a large quantity of similar kind in their cellars, but the particular barrels were never identified. A bill of sale was made out to them and they gave their notes to the defendants for the price. It was also

brought replevin against the officer. He was held entitled to recover. Speaking of this case the court (in Scudder v. Worster) say: "This case, on the face of it, seems to go far to recognize the right of one having a definite number of barrels of any given articles mingled in a common mass, to select and take, to the number he is entitled, although no previous separation had taken place. It is, however, to be borne in mind in reference to this case that it did not arise between vendor and vendee. The interest in the seventy-six bags of coffee did not originate by purchase from W. & R. They became the specific property of the plaintiff in that action on an adjustment of an adventure, the whole proceeds of which were in his hands, and separated with the possession only when he took their accountable receipt for seventy-six bags held by them on his account. It did not raise the question, here so fully discussed, as to what is necessary to constitute a delivery, and how far it was necessary to have a separation from a mass of articles to constitute a transfer of title. Perhaps the circumstances may well have warranted that decision, but we are not satisfied that the doctrine of it can be properly applied to a case where the party asserts his title claiming only as a purchaser of a specific number of barrels, there having been no possession on his part, and no separation of the same from a larger mass of articles similar in kind and no descriptive marks to designate them." The court (referring still to Scudder v. Worster) cited and approved Hutchinson v. Hunter, 7 Barr (Pa.), 140, where, in an action of *assumpsit* to recover payment for one hundred barrels of molasses sold to the defendant out of a lot of one hundred and twenty-five barrels, the whole of which had been destroyed by fire while on storage before separation or designation of any particular barrels, it was held that the plaintiff could not recover, the sale never having been consummated; and to Golder v. Ogden, 15 Pa. St. 528, 53 Am. Dec. 618, in which, in a controversy between the alleged buyer of goods and the assignee of the vendor, as to the effect of a contract for the sale of two thousand pieces of wall paper out of a slightly larger lot in the possession of the vendor, the purchaser giving his note for the price and taking away one thousand pieces, the other to remain until called for, it was held that the remaining one thousand pieces, not having been selected or separated or set apart, but remaining mingled with other paper of the same description, did not become the property of the alleged buyer as against the assignee; and to Waldo v. Belcher, 11 Ired. (N. C.) 609, where a contract of sale of two thousand eight hundred bushels of corn out of a lot of three thousand one hundred bushels in the vendor's store passed no title, the whole having been destroyed by fire before separation; and to Merrill v. Hunnewell, 13 Pick. (Mass.) 213,

agreed that the pork should remain on storage in the cellar of defendants, but at the risk and expense of the purchasers. Shortly after, S. T. & Co. sold one hundred barrels of the pork to L., giving him an order for the same upon the defendants, who delivered that quantity to him. S. T. & Co. then sold the remaining one hundred and fifty barrels to plaintiff, giving him a like order upon defendants. Plaintiff notified defendants of his purchase and requested them to hold the pork on storage for him, to which they assented. While the pork was so on storage for plaintiff, with other of the same kind, S. T. & Co. became insolvent, not having paid the notes given by them to defendants for the pork, and defendants thereupon refused to deliver the one hundred and fifty barrels to plaintiff, and he brought this action of replevin to recover them. The officer selected one hundred and fifty barrels from the stock in defendants' cellar and delivered them to the plaintiff.

§ 715. ——. The court held that no title to this or any other specific one hundred and fifty barrels had passed to the plaintiff, and that consequently the action could not be maintained, approving the rule laid down by the court in Pennsylvania in *Golder v. Ogden*, "that the property cannot pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards." It was intimated that the result might have been different if the action had been simply to recover the value of one hundred and fifty barrels of pork.

where a contract to sell nine arches of brick out of a kiln containing a larger number passed no title, as there had been no separation or designation.

Ferguson v. Northern Bank of Kentucky (1879), 14 Bush (Ky.), 555, 29 Am. R. 418, is also an interesting and important case upon this side. Ferguson was the assignee for creditors of Krauth, Ferguson & Co., pork-packers in Louisville. To borrow money from the bank, the firm attempted to pledge certain of their goods, and to do so had deposited two warehouse receipts signed by them stating that they had received on storage at their pork house, in one receipt three thousand six hundred sugar-cured hams weighing

§ 716. —— The weight of authority.— In a late case in Pennsylvania[1] it is said, though the point was not directly involved and the conclusion was certainly contrary to the earlier cases in that State, that "the weight of American au-

fifty thousand four hundred pounds, marked "Krauth, Ferguson & Co., Eclipse," and in the other eight thousand two hundred and fifty sugar-cured hams, marked "Krauth, Ferguson & Co.," which they would deliver on return of the receipt properly indorsed. At the time of the delivery of these receipts the hams belonged to the firm and were part of a larger quantity stored in their warehouse. They were never separated or set apart. The firm becoming insolvent made an assignment to one Ferguson, who took possession of the entire lot and sold them without recognizing any right in the bank, whose loan had not been paid. The action was in chancery to determine the title. It was held that the bank acquired no title or lien. Scudder v. Worster was approved and followed, and Kimberly v. Patchin was disapproved.

A contract for the sale of a quantity of cotton ties, part of a larger lot, passes no title until they are separated. Fry v. Mobile Savings Bank (1883), 75 Ala. 473. A contract for the sale of one hundred barrels of corn in a crib containing a larger quantity, nothing being done to separate the part sold from the residue, does not vest a title in the purchaser upon which he can maintain detinue or trover for any part of the corn. Warten v. Strane (1886), 82 Ala. 311, 8 S. R. 231.

In Morrison v. Dingley (1874), 63 Me. 553, Morrison in Maine ordered of one Wallace, in Boston, one hundred and twenty-five *gross* tons of coal. Wallace sent a cargo of about two hundred and fifty tons, and the whole cargo was unloaded upon the wharf. Then Wallace, by his broker, sold one hundred and twenty-five tons to Dingley. Morrison began to remove his coal, and when he had removed one hundred and twenty-five *net* tons, Dingley stopped him, claiming that Morrison should take no more until Dingley had gotten one hundred and twenty-five tons, when the residue should be equally divided. The difference to Morrison between the net and the gross tons was fifteen net tons. Morrison sued Dingley in trover for the fifteen tons, but it was held that no title to the part undelivered had passed. The court cited with approval Scudder v. Worster, 11 Cush. (Mass.) 573 (*ante*); Houdlette v. Tallman, 14 Me. 400; Bailey v. Smith, 43 N. H. 141 (*post*); Gibbs v. Benjamin, 45 Vt. 124, and distinguished

[1] Brownfield v. Johnson (1889), 128 Pa. St. 254, 18 Atl. R. 543, 6 L. R. A. 48. So in Cloke v. Shafroth (1891), 137 Ill. 393, 27 N. E. R. 702, 31 Am. St. R. 375, it is said: "It is held, by what is probably the weight of modern American decisions, that where the sale or exchange is of part of a mass of the same kind, quality and grade, as of part of the corn or wheat in an elevator, separation from the mass, or other specification of the particular part sold, is unnecessary to its appropriation, independent of the statute vesting the ownership in the holder of a warehouse receipt." The statement, however, was *dictum*.

thority supports the proposition that, when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may

Kimberly v. Patchin (*supra*), and Waldron v. Chase, 37 Me. 414 (cited in preceding note). Dickerson, J., delivered a forcible dissenting opinion.

In Reeder v. Machen (1881), 57 Md. 56, there had been a contract for the sale of five hundred tons of coal of three different varieties at different prices. The coal was part of a larger quantity lying in the coal yard, and nothing had been done to separate the five hundred tons from the residue. Afterwards the vendee, without the knowledge or consent of the vendors, removed three hundred and eighty-five tons. The vendors became insolvent, and it was held that no title to any part of the five hundred tons had passed, on the ground that not only separation but weighing or measuring was necessary.

In Keeler v. Goodwin (1873), 111 Mass. 490, there was a contract of sale of one thousand bushels of corn, "parcel of a larger quantity lying in bulk." Said the court: "Until separation in some form no title could pass. Young v. Austin, 6 Pick. 280; Merrill v. Hunnewell, 13 Pick. 213; Scudder v. Worster, 11 Cush. 573; Weld v. Cutler, 2 Gray, 195; Ropes v. Lane, 9 Allen, 502, 510; S. C., 11 Allen, 591. That it was on storage with a third party, as warehouseman, would make no difference in this respect."

A sale of a quantity of oats to be weighed out of a bin containing a larger quantity, accompanied by payment of the price, gives no title, before the quantity sold is separated from the bulk, upon which the vendee can maintain trover against the vendor for a conversion of the quantity sold. Jeraulds v. Brown (1888), 64 N. H. 606, 15 Atl. R. 123. A contract to sell two thousand out of a larger lot of poles passes no title until they have been separated. Bailey v. Smith (1861), 43 N. H. 141.

In Commercial National Bank v. Gillette (1883), 90 Ind. 268, a contract for the sale of a quantity of car wheels out of a larger lot was held to pass no title until separation. "There is much strife in the American cases upon this question," said the court, "but none in the English. The weight of the former is, perhaps, with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long-established rule of the common law. In the case of Bricker v. Hughes, 4 Ind. 146, the English rule was approved and enforced. In Murphy v. State, 1 Ind. 366, the court said: 'To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough . . . that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass.' This doctrine found approval in Scott v. King, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them Moffatt v. Green, 9 Ind. 198; Indianapolis, etc. Ry. Co. v. Maguire, 62 Ind. 140; Bertelson v. Bower, 81 Ind. 512; Lester v. East, 49 Ind. 588. The rule

serve as illustrations of this rule. Where, however, the property sold is part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply.

which our court has adopted is upheld by the American cases of Hutchinson v. Hunter, 7 Pa. St. 140; Haldeman v. Duncan, 51 Pa. St. 66; Fuller v. Bean, 34 N. H. 290; Ockington v. Richey, 41 N. H. 275; Morrison v. Woodley, 84 Ill. 192; Woods v. McGee, 7 Ohio, 127; McLaughlin v. Piatti, 27 Cal. 452; Courtright v. Leonard, 11 Iowa, 32; Ropes v. Lane, 9 Allen (Mass.), 502; Ferguson v. Northern Bank, 14 Bush (Ky.), 555, 29 Am. R. 418. . . . The American cases which have departed from the long-settled rule are built on the cases of Kimberly v. Patchin, 19 N. Y. 330, and Pleasants v. Pendleton, 6 Rand. (Va.) 473, and these cases proceed upon the theory that commercial interests demand a modification of the rule. In our judgment, commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved."

In Blakely v. Patrick, Adm'r (1870), 67 N. C. 40, 12 Am. R. 600, where a mortgage was given by a buggy maker upon "ten new buggies," but the particular buggies had never been selected, and it appeared that those actually in the mortgagor's possession when the instrument was executed had been disposed of and others built to take their places, it was held that no interest in any particular buggies passed to the mortgagee.

In New England, etc. Co. v. Worsted Co. (1896), 165 Mass. 328, 43 N. E. R. 112, the plaintiffs, manufacturers of combed wool, agreed to sell an unascertained number of pounds of such wool to the defendants. The wool, after being combed, was passed into bins through a spout, and there was nothing to distinguish that which was made one day from that which was made on any other. The contract covered all wool manufactured within thirty certain days. *Held*, that unless the wool manufactured on those days had been separated from the rest of the bulk no title passed.

In Baldwin v. McKay (1867), 41 Miss. 358, the parties supposed that the vendor's stock of cotton, lying unginned, contained ten bales, and a contract of sale was made covering eight bales from this stock. The bales sold were not separated at the time, but subsequently, when the cotton came to be ginned, it was found to have rotted in many places so that it ginned out to only six bales. *Held*, that no title passed, and the fact that there turned out to be only six bales after ginning did not alter the case.

Sale of part of a bin of wheat passes no title before separation. Cook v. Logan (1858), 7 Iowa, 141. So of a contract to sell "25 M brick off the west end of my kiln." Courtright v. Leonard (1860), 11 Iowa, 32. See also Rosenthal v. Risley (1861), 11 Iowa, 541; Snyder v. Tibbals, 32 Iowa, 447; Coffey v. Quebec Bank (1869), 20 Up. Can. C. P. 110, citing Glass v. Whitney, 22 Q. B. 290; Dunlap v. Berry (1843), 5 Ill. 327, 39 Am. Dec. 413; Pollock v. Fisher (1849), 6 N. B. 515; Stevens v. Eno (1850), 10 Barb. 95 (overruled by Kimberly v. Patchin); Gardiner v. Suydam (1852), 7 N. Y.

The storage of oil in tanks and of grain in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities; and whilst no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage, the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in conformity with the commercial usages of the country. A distinction is made between those cases where the act of separation is burdensome and expensive or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer."

§ 717. ——. A number of special advocates[1] of what they call the "new rule," *i. e.*, the rule of *Kimberly v. Patchin*, have also appeared, but it is believed that except in those cases — standing upon distinct ground — in which a commercial usage prevails, the weight of reason as well as authority requires that there shall be a separation from the mass before the title can pass.

II.

Contracts for the Sale of Chattels of a Certain Kind, Where the Particular Goods Have Not Yet Been Designated.

§ 718. **Nature of subject.**— Akin to the subject of the last subdivision is the question which arises where a contract has

(3 Seld.) 357 (see discussion of this case in Kimberly v. Patchin, p. 339); McDougall v. Elliott (1860), 20 Up. Can. Q. B. 299; Box v. Insurance Co. (1868), 15 Grant's Ch. (Up. Can.) 337; Upham v. Dodd (1866), 24 Ark. 545; Browning v. Hamilton (1868), 42 Ala. 484; Mobile Bank v. Fry (1881), 69 Ala. 348; Gresham v. Bryan (1893), 103 Ala. 629, 15 S. R. 849; Thomas v. State (1859), 37 Miss. 353; Lawry v. Ellis (1893), 85 Me. 500, 27 Atl. R. 518; Huntington v. Chisholm (1878), 61 Ga. 270; Railroad Co. v. Burr (1874), 51 Ga. 553; Cleveland v. Williams (1867), 29 Tex. 204, 94 Am. Dec. 274; Davis v. Hill (1826), 3 N. H. 382, 14 Am. Dec. 373.

[1] See particularly the monograph of Mr. Robert Ralston, "Sale of Undivided Interests" (1885).

been made to supply goods of an agreed kind, but no particular goods are, at the time, designated as the ones to which the contract is to apply. The most common illustration is where goods of a particular kind are ordered of a dealer or manufacturer, the goods themselves not being present and designated, or perhaps not being yet in existence, and the dealer or manufacturer is charged with the right and duty of selecting or designating the goods which shall be supplied,— in other words, of appropriating the goods to the contract. The question which arises is, When does the title pass?

§ 719. **Under what circumstances question arises.**— The question arises usually, if not invariably, either where some distance of time is to intervene between the making of the contract and the fulfillment of it, or where some distance of space intervenes between the place of making the contract and the place of its fulfillment, or where both elements exist.

The question may also arise under a great variety of circumstances, some of which may be indicated thus:

I. Goods ordered of dealer and to be supplied; and —
  1. The vendor is to deliver the goods, or
  2. The vendee is to come and get the goods, or
  3. The vendor is to ship the goods, and there is —
    (*a*) A carrier designated, or
    (*b*) No carrier designated but some carrier intended, or
    (*c*) No carrier named or expressly contemplated, though the goods are to be shipped, and —
    (*d*) The consignor is to pay the freight, or
    (*e*) The consignee is to pay the freight, or
    (*f*) The title is to pass at once but the goods are not to be paid for unless they arrive.

II. Goods to be supplied by the producer, and
  1. To be manufactured, or
  2. To be grown.

§ 720. **What to be included here.**— Of the various questions thus suggested, those falling under the first head will be dealt with here, while those falling under the second will be con-

sidered in the following chapter. And the specific question will be, Where a contract is made for the sale of existing goods of a certain kind, but the particular goods are not yet designated, what must be done in order that the title to some goods of this kind shall pass?

For the purposes of an orderly discussion of the question, the following subdivisions may be suggested:

1. Of appropriation in general.
2. Of appropriation where the seller is to carry the goods.
3. Of appropriation where the buyer is to come for the goods.
4. Of appropriation where the seller is to send for the goods by carrier.
5. Of appropriation where goods are consigned on account of previous advances.

1. *Of Appropriation in General.*

§ 721. General necessity for appropriation. — Upon the making of a contract for the sale of a part of a larger mass of goods, as seen in the last subdivision, or of goods thereafter to be supplied, no particular goods, however, being designated, it is clear that no present title does or can thereby pass. The contract at this point is purely executory, and it cannot be effectual to transfer title until it has become attached to some specific goods upon which it can operate. What is essential now is the *appropriation* of the goods to the contract, and when this occurs the contract becomes executed and the title is transferred.[1]

§ 722. What is meant by appropriation.—"The word *appropriation*," said Baron Parke in one case,[2] "may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will show when the word is used in that sense. Or the word

[1] See Merchants' Nat. Bank v. Van Deusen, 33 Minn. 111, 22 N. W. Bangs, 102 Mass. 291; Fis.back v. R. 244.

[2] Wait v. Baker (1848), 2 Exch. 1.

may mean that *both* parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case.[1] . . . '*Appropriation*' may also be used in another sense, . . . viz.: where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it."

§ 723. Who interested in question.— The fact of the appropriation may be of interest to several parties. It is, of course, chiefly of interest to the buyer and seller, but creditors and subsequent purchasers may be interested as well. Until appropriation the goods are still the seller's, and the risk is his. If he has begun but not finally completed the appropriation, he may change his mind and substitute other goods. If the appropriation is complete, the goods belong to the seller and he has the right to those particular goods.

If the appropriation is not complete the goods are still the seller's and may be taken for his debts; if it is complete, they are the buyer's and may be seized upon process against him.

If the appropriation is not complete, the seller may sell the goods to another;[2] if it is complete, the seller, at least, would

[1] Continuing here the learned judge further said: "For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coach-maker's; he may make any one he pleases and, if it agree with the order, the party is bound to accept it. Now, suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coach-builder by which it is agreed that a particular carriage shall be delivered. It would depend upon circumstances whether the property passes or whether merely the original contract is altered, from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage — which, in the Roman law, was called *obligato certi corporis*, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery, although the property, after the contract, remained at the risk of the vendee, and, if lost without any fault in the vendor, the vendee and not the vendor was the sufferer. The law of England is different: here property does not pass until there is a bargain with respect to a specific article and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it."

[2] Walker v. Collier (1865), 37 Ill.

be liable if he should so dispose of them, and if the delivery were sufficient the first purchaser could recover them.[1]

§ 724. **Who may make the appropriation.**— The act of appropriation may, by the terms of the agreement, be devolved either upon the vendor or the vendee; or it may be left to be made by one party and assented to by the other. In the majority of cases, however, for reasons which will be obvious, the appropriation is to be made by the vendor. Mr. Benjamin states the rule as follows: "The rule on the subject of election is that when, from the nature of the agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act the election has been irrevocably determined, but till then he may change his mind."[2]

§ 725. ——. He quotes further the rule laid down by Lord Blackburn,[3] and approved by the courts,[4] to the effect "that where, from the terms of an executory agreement to sell unspecified goods, the vendor is to dispatch the goods or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made finally and conclusively by the authority conferred in the agreement,[5]

362; Cole v. Bryant (1895), 73 Miss. 297, 18 S. R. 655; North Pacific Lumbering Co. v. Kerron (1892), 5 Wash. 214, 31 Pac. R. 595.

[1] See Hagins v. Combs (1897), 102 Ky. 165, 43 S. W. R. 222.

[2] Bennett's 6th Am. ed., § 359.

[3] Blackburn on Sale, 128.

[4] Aldridge v. Johnson, 7 E. & B. 885, 901, per Erle, J.

[5] In Mitchell v. Le Claire (1896), 165 Mass. 308, 43 N. E. R. 117, the plaintiffs had orally offered to sell to the defendant a quantity of butter of the same kind and quality that he had previously bought of them at a certain price, provided he accepted before twelve o'clock the following day. Within that time defendant accepted the offer by telegram. Said the court: "The plaintiffs had in their store-house a large quantity of butter. Upon receipt of the defendant's telegram accepting their offer they were immediately authorized, as the defendant's agents, to set apart

and, in Lord Coke's language, 'the certainty, and thereby the property, begins by election.' But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet, until the act has actually commenced, the appropriation is not yet final, for it is not made by the authority of the other party nor binding on him."

§ 726. **What constitutes appropriation in general.**—What act shall be sufficient to constitute an appropriation cannot be determined by any inflexible rule. In general, however, that act or series of acts constitutes an appropriation which fully and finally designates the particular chattel upon which the contract is to operate. Appropriation, as will be seen in the following section, is the act of one party or of both. It is primarily the act of both parties, and can only become the act of one alone when the other has expressly or impliedly agreed that he may make it. Until finally and completely consummated it is revocable by either party; when finally and completely consummated, whether by the act of both parties or of one with the consent of both, it is irrevocable except with the consent of both.

§ 727. —— **Appropriation consists of acts, not mere intention.**— Appropriation must clearly be an act and not a mere intention. It must also be a definite and unequivocal act, done in pursuance and contemplation of the contract, with the intention of bringing the designated chattel and the contract

and appropriate to him the goods called for by the contract. This they immediately did, weighing the butter, setting it apart and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked 'cash on demand.' This completed the sale and passed the title. Arnold v. Delano, 4 Cush. (Mass.) 33, 37, 50 Am. Dec. 754; Ropes v. Lane, 9 Allen (Mass.), 502, 510; Merchants' National Bank v. Bangs, 102 Mass. 291, 295; Marble v. Moore, 102 Mass. 443; Morse v. Sherman, 106 Mass. 430; Safford v. McDonough, 120 Mass. 290; Gilmour v. Supple, 11 Moore, P. C. 551, 556; Tarling v. Baxter, 6 B. & C. 360."

into mutual operation and with the purpose of thereby fulfilling the contract. In a leading case[1] in which there had been a contract for the sale of a quantity of barley out of a larger and ascertained mass, to be put into the vendee's sacks by the vendor, it was held that as soon as the vendor had filled a sack he had appropriated that much to the contract irrevocably (though he never filled the entire number of sacks), and that the title had thereupon passed, so that if he emptied the contents of the sack back into the mass the vendee could recover its value. Said Erle, J.: "When he had done the outward act which showed what part was to be the vendee's property, his election was made and the property passed. That might be shown by sending the goods by the railway; and in such case

[1] Aldridge v. Johnson (1857), 7 El. & Bl. 885. In this case Aldridge made a contract with Knights to trade a lot of cattle towards one hundred out of two hundred quarters of barley agreed upon and to pay the balance in cash. It was agreed that Aldridge should send his own sacks to be filled with the barley and Knights was to fill the sacks, take them to a railway station, put them on cars free of charge and send them to Aldridge. Aldridge send the sacks and delivered the cattle to Knights. Some of the sacks were marked with Aldridge's name. Knights filled one hundred and fifty-five of the two hundred sacks sent, but could not get the cars to send them. Aldridge made several demands to have the barley sent and Knights assured him it would be sent as soon as he could get the cars. Before it had been sent Knights became insolvent and emptied the contents of the one hundred and fifty-five sacks back into the pile. Johnson was the assignee of Knights and refused to surrender any part of the barley, and this action was brought to recover the entire quantity bargained for. *Held*, that plaintiff could recover for the one hundred and fifty-five sacks but not for the residue which had never been appropriated.

Campbell, C. J., said: "Looking to all that was done, when the bankrupt put the barley into the sacks *eo instanti* the property in each sackful vested in the plaintiff. I consider that here was a priorian assent by the plaintiff. He had inspected and approved of the barley in bulk. He sent his sacks to be filled out of that bulk. There can be no doubt of his assent to the appropriation of such bulk as should have been put into the sacks." In speaking of this case in the later case of Langton v. Higgins (1859), 4 H. & N. 402, Pollock, C. B., said: "I doubt whether it was necessary to tie up the sacks, or do anything more than put the barley in them; as when goods are put on board a ship it is not necessary to stow down the hatchway: the filling the sacks with the barley was a decisive act of appropriation and delivery."

the property would not pass till the goods were dispatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the vendor to decide what portion should be delivered under that contract. As soon as he does that his election has been indicated; the decisive act was putting the portion into the sacks." This decision has been followed in several other cases where the goods were to be put into the buyer's receptacles, the title being held to pass as soon as they were so placed.[1]

§ 728. —— **Acts must be in fulfillment of the contract.**— But in these and other cases the act done must, as has been stated, be done in *fulfillment* of the contract. Acts done, therefore, looking toward fulfillment or in partial fulfillment only are not enough to constitute an appropriation. If, then, for illustration, the contract provides for a boatful of goods, there is no appropriation until there is a boatful, and the property does not pass as it goes into the boat so as to charge the vendee with the loss, or give him a right of action for conversion, if the property be destroyed or diverted before the boat is full,[2] even though the boat be one furnished by the vendee.[3]

[1] Thus in Langton v. Higgins (1859), 4 H. & N. 402, under a contract for the sale of a crop of peppermint oil to be put into the vendee's bottles, it was held that the putting of the oil into the bottles was such an appropriation as passed the title as against another vendee of the vendor.

[2] The leading case of Bryans v. Nix (1839), 4 M. & W. 775, is of this character. The action was trover for the recovery of the value of two cargoes of oats, one on board boat No. 604 and the other on board boat No. 54. The facts, as stated by the court, were as follows: Miles Tempany, a corn merchant at Longford, who employed the plaintiffs as his factors at Liverpool, shipped on board the boat No. 604 a full cargo of oats and took a bill of lading or boat receipt for them, signed by the master, bearing date

[3] Thus, in Rochester Oil Co. v. Hughey (1867), 56 Pa. St. 322, there was a contract for four boat-loads of oil, to be drawn from tanks into the purchaser's boats, and to be paid for at so much per barrel. While one boat was being filled it caught fire and was destroyed, *Held*, that the title did not pass as the oil ran in or until there was a boat-load, and hence that the loss fell on the seller. To same effect: Hayes v. Pittsburg Co. (1888), 33 Fed. R. 552.

§ 729. Assent to the appropriation.—It inheres in the very nature of the case that appropriation can only be made with the assent of both parties, for until they have determined upon the chattel which is to be sold there can obviously be no com-

the 31st of January, 1837, whereby he acknowledged the receipt of the oats on board, deliverable in Dublin to John and T. Delany, *in care for and to be shipped to* the plaintiffs in Liverpool. On the same day he procured from the master of another boat, No. 54, a like bill of lading or receipt for five hundred and thirty barrels, but no oats were then on board that boat, although a cargo was prepared for that purpose. On the 2d of February Tempany wrote to the plaintiffs a letter inclosing both those instruments and stating that he had valued on the plaintiffs for 730*l. against those* oats. On the 7th the plaintiffs received this letter and accepted the bill of exchange and returned it to Tempany, who received it on the 9th. In the meantime the defendant, who was a creditor of Tempany to a considerable amount, sent over Mr. Walker, an agent, to Longford. Walker arrived on the 6th and pressed him for security. Tempany consented on that day to give him an order, addressed to Tempany's brother, his agent in Dublin, requesting him to deliver to Walker, for the defendant, the cargo of boat 604, which had then sailed for Dublin, and four other cargoes, including that of boat 54 (which was stated to be five hundred and sixty barrels), and also all that was in Tempany's store in Dublin. The boat 54 was then partially loaded, and Tempany promised to send the boat receipt for it to Walker. The loading was completed on the 9th, the boat receipt or bill of lading for five hundred and fifty barrels, which were on board, signed by the master and transmitted to Walker, to whom the cargo was made deliverable, and he received it the next day. The boats were both hired by Tempany and the men paid by him. Walker, on the 8th, procured an agreement from J. Tempany, in Dublin, to hold the oats for him when they arrived, and he afterwards got possession of the whole by legal process. As to boat 604, the court held that there was a sufficient appropriation to pass the title to the plaintiffs, "at least on the 7th of February, when they complied with the condition by accepting the bill, and before the 7th no other title to the oats intervened, for the order to deliver them to Walker, given on the 6th, was clearly executory only." But the claim of the plaintiffs to the cargo of boat No. 54 was denied. Said the court, by Parke, B.: "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st of January, to hold the five hundred and thirty barrels therein mentioned for the plaintiff, there were no such oats on board, and consequently no *specific chattels* which were held for them. The undertaking of the boat master had nothing to operate upon, and, though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property; he might have altered their destination and sold them to any one else; the master's receipt no

pleted contract of sale.[1] The assent, however, need not be express, nor need it be made subsequent to the act. Either party, moreover, may expressly or impliedly agree beforehand that the other, or some third person, may make the appropria-

more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of five hundred and thirty barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should have probably held that the property in these oats passed to the plaintiff, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of five hundred and thirty barrels was shipped, and when a small quantity of oats only were loaded, and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due him; for such is the effect of the delivery order of the 6th and the agreement with Walker of the same date to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory; on the 9th the appropriation took place, by the boat receipt for the five hundred and fifty barrels *then on board*, which was signed by the master at the request of Tempany, whereby the master was constituted the agent of the defendant to hold those goods; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiffs*, but he did not do so."

[1] Upon this point the language of Lord Blackburn is instructive: "It has been already said that the specific goods must be agreed upon; that is, both parties must be pledged, the one to give and the other to accept those specific goods. This is obviously just, for until both parties are so agreed the appropriation cannot be binding upon either; not upon the one, because he has not consented, nor upon the other, because the first is free. But the application of this principle leads to nice and subtle distinctions, which perhaps cannot be helped, but are none the less to be lamented. When the goods are selected from the first in the original agreement there is of course no difficulty on the point; both parties are then bound to apply the contract to those specific goods. Neither is there any difficulty where both parties have subsequently assented

tion, and an appropriation so made is therefore with his assent. In other words, the assent may be, and frequently is, anticipative, and may be given by one through the agency of the other. Thus, for example, is it usually, where goods of a certain kind are ordered to be supplied by a dealer: the buyer beforehand impliedly assents that the seller may determine which goods of that kind shall be furnished.[1] So is it also where the vendee is to select the goods from a larger mass: the vendor beforehand assents that such goods shall pass as the vendee may so select.[2] In either case, therefore, when the party charged with the duty of selection has finally and conclusively selected and determined the goods of the kind agreed upon, the appropriation is made and the contract is complete without the necessity of any subsequent assent by the other.

to the appropriation of some specific goods to fulfill an agreement that in itself does not ascertain which the goods are to be. The effect is then the same as if the parties had from the first agreed upon a sale of those specific goods. In the accurate language of Holroyd, J. (Rhode v. Thwaites, 6 B. & C. 388), 'the selection of the goods by the one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.'

"But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.

"The question of whether there had been a subsequent assent or not is one fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety." Blackburn on Sale, p. 129.

[1] Thus, in Aldridge v. Johnson (1857), 7 El. & Bl. 885, 901, Erle, J., says: "If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained. Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only. *When he had done the outward act which showed which part was to be the vendee's property, his election was made, and the property passed.*"

Many other cases are cited in the notes to the following sections.

[2] See *ante*, § 703, and cases cited.

§ 730. —— Buyer's assent made necessary by terms of contract.— But the parties may expressly or impliedly agree that the appropriation shall not be deemed complete until the vendee has assented, and in such a case the vendee's assent, if not waived, is indispensable: until it is given, appropriation by the vendor alone binds nobody, not even himself, and he may therefore recall it.[1]

[1] See Blackburn on Sale, p. 129, *supra;* Andrews v. Cheney, following. In Andrews v. Cheney (1882), 62 N. H. 404, plaintiff bought goods of defendant by sample and paid for them. Defendant did not then have the goods in stock, but was to get them by a certain time, when the defendant was to call for them. Within that time defendant procured the goods, set them apart by themselves and marked them with the plaintiff's name. The plaintiff did not call for them within the stipulated time, and after that time had elapsed the goods were destroyed by the burning of defendant's store. The plaintiff brought this action to get back the price he had paid for them. Said the court: "The property in the goods did not pass to the plaintiff by virtue of the contract, for they were not then ascertained, and may not have been in existence. The agreement on the part of the defendant was executory. He agreed to furnish goods corresponding to the samples selected by the plaintiff. If the goods, subsequently procured and set apart by the defendant, did not conform to the samples, the plaintiff had a right to reject them. It does not appear that he waived that right. The defendant was not concluded by his selection; he might have sold or otherwise disposed of the particular articles set apart by him, and substituted others in their place. A contract of sale is not complete until the specific goods upon which it is to operate are agreed upon. Until that is done the contract is not a sale, but an agreement to sell goods of a particular description. It is performed on the part of the vendor by furnishing goods which answer the description. If, as in the case of a sale by sample, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific goods to the contract is made with the assent of both parties. Bog Lead Mining Co. v. Montague, 10 C. B. (N. S.) 481; Jenner v. Smith, L. R. 4 C. P. 270; Heilbutt v. Hickson, L. R. 7 C. P. 438; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Blackb. Sales, 122, 127; Benj. on Sales, § 358. If plaintiff authorized the defendant to make the selection, the property immediately on the selection vested in the plaintiff. Aldridge v. Johnson, 7 E. & B. 885. It not appearing that the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant and their destruction was his loss." On other grounds, however, the court held that the plaintiff could not recover.

So, in Boothby v. Plaisted (1871), 51 N. H. 436, 12 Am. R. 140, it was

§ 731. —— Buyer's assent required by implication — Sales by sample.— If the contract requiring the buyer's subsequent assent is express there can ordinarily be no difficulty; it is only in those cases in which it is contended that such assent is an implied term of the contract that trouble arises. The case most frequently presented, perhaps, is that of a sale by sample, and concerning this there is some apparent conflict of authority. It has been held in England that such a contract does not imply power in the seller to make a final appropriation and that the subsequent assent of the buyer is required.[1] But the rule sus-

expressly agreed that the vendee, after the goods "arrived at his store, might examine them, and, if not according to sample, he need not accept the same." The court said that this did not differ from other sales by sample "except that in this case it was agreed that the defendant [the buyer] should decide for himself whether or not the goods were according to the sample; and he certainly cannot be heard to object that he himself was made the umpire, and has by his own acts decided the case in favor of the plaintiff."

[1] Jenner v. Smith (1869), L. R. 4 C. P. 270. is the leading case upon this subject. That was an action to recover the price of two pockets of hops as goods sold and delivered and goods bargained and sold. The parties met at a fair, and it was orally agreed that defendant should purchase of the plaintiff two pockets of hops then at the fair and inspected by the defendant and also two other pockets of which a sample was shown. After the purchase had been agreed upon, defendant was informed that the latter were lying in Prid & Son's warehouse in London, and he requested that they be left there until he sent word that he was ready to receive them. He took the other two pockets at the fair. The plaintiff, a day or two afterwards, sent defendant an invoice stating numbers, weight and price of the four pockets, with an intimation that the two pockets in the warehouse were subject to his order. The plaintiff had three pockets at the warehouse, and he had in the meantime gone to the warehouse and directed the warehouseman to put certain marks upon two of them to indicate that they were sold and were to wait the orders of the purchaser. No change was made in the books of the warehouseman. The defendant refused to accept these two pockets, and hence this action. Plaintiff was nonsuited at the trial and this was sustained by the court of common pleas. Said Brett, J.: "Here there was no previous authority given to the plaintiff to appropriate; and, if not, what evidence was there to show that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways — by himself or by an authorized agent. By himself, after the receipt of the letter containing the invoice: or by the warehouse keepers, if there had been any evidence of agency or authority

tained by the weight of authority in the United States is that, if the seller in fact appropriates goods which do conform in all respects to the sample, the title thereby passes and the buyer cannot afterwards reject them. It is, of course, a condition precedent to the operation of this rule that the goods shall so conform, for the seller cannot bind the buyer to take goods of a kind he never agreed to take; and, if the goods supplied do not in fact conform to the sample, the buyer may reject them; but, subject to this right of examination and rejection, the title passes by the appropriation of the seller.[1]

in them to accept, and assent by them to hold the hops for him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to show that there had been no such assent by the defendant. And, as to Prid & Son, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Counsel has strongly put forward a point which was not made at the trial, viz., that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the choice so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently the plaintiff cannot recover as for goods bargained and sold."

[1] In Boothby v. Plaisted (1871), 51 N. H. 436, 12 Am. R. 140, there was a sale by sample coupled with an express agreement that, after the goods arrived at his store, the vendee "might examine them, and if not according to sample he need not accept the same." The buyer received and used the goods, but the court said: "If the plaintiffs [the sellers] performed their part of the contract fully by delivering at the time and place agreed the article which they agreed to furnish, then it became at once the property of the defendant, and he would ordinarily have no right to refuse to accept it."

In Wadhams v. Balfour (1898), 32 Oreg. 313, 51 Pac. R. 642, there was a sale by sample of a carload of wheat. At the time of the sale the seller indorsed and delivered to the buyer the bill of lading, which both parties treated as a constructive delivery of the wheat. Before the car reached its destination it was destroyed by fire, and the action was for the price. The court said that the right of inspection was a condition of the contract, but whether precedent or subsequent depended

§ 732. —— How buyer's assent given when required.— Where the buyer's assent is required, no particular method of giving it is indispensable. The fact of giving it is, here, as in former cases, the material thing. And, as is said by Lord Blackburn, "the question of whether there has been a subsequent assent or not is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law."[1]

in great measure upon the contract. If the title had passed it was a condition subsequent. In this case the parties treated the title as passing by the indorsement and delivery of the bill of lading. The opportunity for examination and inspection had been removed by the destruction of the property, but the title having passed the risk of loss passed with it, and the buyers must pay for it. Boothby v. Plaisted, *supra*, was cited with approval: and to the point that the title passes by the delivery to the carrier of such goods as are ordered, even though the buyer may have a reasonable time after their delivery to examine the goods and to "rescind" the contract if they do not conform, the court also cited: Magee v. Billingsley, 3 Ala. 679; McCarty v. Gordon, 16 Kan. 35; Gill v. Kaufman, 16 Kan. 571; Brigham v. Hibbard, 28 Oreg. 387, 43 Pac. R. 383; Johnson v. Hibbard, 29 Oreg. 184, 44 Pac. R. 287, 54 Am. St. R. 787.

The question was also fully examined in Kuppenheimer v. Wertheimer (1895), 107 Mich. 77, 64 N. W. R. 952, 61 Am. St. R. 317, and the same conclusion reached. "If the goods are not up to the sample," said the court, "the right to refuse them exists, which is, in effect, a rescission. The title passes upon delivery to the carrier, subject to this right, of which the purchaser may avail himself or not." Rindskopf v. De Ruyter, 39 Mich. 1, 33 Am. R. 340, was distinguished.

In Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. R. 1017, it was also, upon full consideration, held that on a sale of goods to be supplied in accordance with a sample, an appropriation of the goods by the seller, in full conformity to the sample, passed the title without a subsequent assent by the buyer.

In Colorado Springs Live Stock Co. v. Godding (1894), 20 Colo. 249, 38 Pac. R. 58, it is said: "While it has been held in some of the cases that the acceptance by the purchaser of an article appropriated by the seller according to the terms of an executory contract of sale is necessary to pass the title, the weight of authority is that the appropriation by the seller of an article, when completed in accordance with the terms of the contract, passes the title without the subsequent assent of the purchaser, and an action for the agreed price can be maintained."

[1] Blackburn on Sale, p. 129, cited *supra*. In Alexander v. Gardner (1835), 1 Bing. N. C. 671, there was a

2. *Of Appropriation when Seller to Deliver the Goods.*

§ 733. How when the vendor is to select and deliver the goods.— Where, by the terms of the contract, the seller is to select and deliver the goods at any particular place or in any particular manner, the goods ordinarily remain his property and at his risk until they are delivered in accordance with the agreement; even if he commits the goods to a carrier for delivery as agreed upon, the carrier is deemed to be his agent, and if the goods are lost while in the charge of the carrier the loss must fall upon the seller.[1] The same rule would, of course,

contract for a cargo of butter, f. o. b., to be shipped in October. The butter was not shipped until November 6th, but defendant waived the delay and consented to take the invoice and bill of lading which described the butter, the weights and marks of the casks, etc. The butter was afterwards lost by shipwreck. *Held*, that the appropriation of this cargo of butter to the contract was complete by mutual assent; that the title had passed, and the buyers must stand the loss.

In Sparkes v. Marshall (1836), 2 Bing. N. C. 761, a cargo of oats was contracted for, to be shipped, etc. Some days later the buyer was informed that the shippers had engaged "room in the schooner Gibraltar Packet of Dartmouth to take about six hundred barrels of black oats on your account." The buyer on the next day ordered insurance "on oats per the Gibraltar Packet of Dartmouth." In an action by the buyer against the insurers it was contended by them that the title had not passed, but it was held otherwise. Tindal, C. J., said that the letter "was an unequivocal appropriation of the oats on board the Gibraltar Packet," and that "this appropriation is assented to and adopted by the plaintiff, who, on the following day," effected insurance, etc.

[1] In McNeal v. Braun (1891), 53 N. J. L. 617, 23 Atl. R. 687, 26 Am. St. R. 441, M., who resided at X., had ordered of B., who was a wholesale coal dealer at Y., a cargo of coal at $4.10 per ton delivered at X. B. chartered a compartment vessel, loaded her with coal, took a bill of lading which promised a delivery to M., and sent the vessel on her way. She reached X. and tied up at M.'s wharf for delivery to M., but before she was unloaded one of the compartments sank, through the negligence of the carrier, and the coal was lost. *Held*, in an action to recover the price, that B. must bear the loss. Said the court: "The plaintiff, instead of being an agent to procure transportation, had himself contracted to deliver the coal, and the instructions ignore the fact that under a contract of that sort the undertaking to deliver is absolute and unqualified, and delivery of the goods is a condition precedent to the right of the vendor to sue for the contract price. If the goods be lost or destroyed before delivery is

apply where the agreement is that the seller shall deliver the goods to a carrier at the point of shipment.[1]

Cases of this class may rest also upon the ground, previously considered, that the seller is to do something to the goods,

consummated the vendor must bear the loss. Under such a contract the carrier selected by the vendor is his agent to perform the contract to deliver, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel. For the negligence of the one and the condition of the other, and, indeed, for failure to make delivery of the coal according to contract for any cause not due to the fault of the purchaser, the responsibility is upon the vendor."

The question whether the title had passed was not directly passed upon, though the court held that even if it had, still, by the terms of the contract, delivery was a condition precedent to the right to recover the price. The case is most appropriately to be classed among those considered *post*, § 744, where the title is to pass at once, though the goods are not to be paid for unless they arrive. Dunlop v. Lambert, 6 Clark & Fin. 600, and Calcutta Co. v. De Mattos, 32 L. J. Q. B. 322, 33 id. 214, were cited and relied upon.

In Magruder v. Gage, 33 Md. 344, 3 Am. R. 177, it is said: "If the vendor undertakes to make the delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent of the vendor, and the property will not pass until the delivery is actually made."

In Dunlop v. Lambert, *supra*, it is said: "If a particular contract be proved between the consignor and consignee — as where a party undertaking to consign undertakes to deliver at a particular place,— the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor."

In Ludlow v. Bowne (1806), 1 Johns. (N. Y.) 1, 3 Am. Dec. 277, it is said that he has the property upon whom the loss in transportation would fall. "And Sir William Scott observes that this is the true criterion of property. He is to be deemed the proprietor on whom the loss would fall in case of accident. 2 Rob. Adm. 135. This is certainly a just and rational criterion between the vendor and vendee; the former is presumed to get a compensation for the risk, and the loss is therefore to be borne by him."

See also Neimeyer Lumber Co. v. Burlington R. Co., 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534; Bloyd v. Pollock, 27 W. Va. 75; Devine v. Edwards, 101 Ill. 138; Taylor v. Cole (1873), 111 Mass. 363; Suit v. Woodhall, 113 Mass. 391; Weil v. Golden, 141 Mass. 364, 6 N. E. R. 229: Sneathen v. Grubbs (1878), 88 Pa. St. 147; Braddock Glass Co. v. Irwin (1893), 153 Pa. St. 440, 25 Atl. R. 490; McLaughlin v. Marston (1891), 78 Wis. 670, 47 N. W. R. 1058.

F. O. B.— As to the effect of a contract to deliver goods "f. o. b." at a certain place, it is said by Norval, J.,

[1] See Odell v. Boston & M. R. Co. (1871), 109 Mass. 50; Spencer v. Hale (1858), 30 Vt. 314.

i. e., deliver them at a given place, before they are in the condition in which, by the terms of the agreement, the purchaser is bound to receive them.

3. *Of Appropriation where the Buyer is to Come for the Goods.*

§ 734. How when the purchaser is to come and get the goods.— Where goods were ordered of a dealer, but the contract did not determine the place of delivery, it was said:[1] "If no place be designated by the contract, the general rule is that the articles sold are to be delivered where they are at the time of the sale. The store of the merchant, the shop of the manufacturer, and the farm of the farmer, at which the commodities sold are deposited or kept, must be the place of delivery when the contract is silent upon the subject; at least, when there are no circumstances showing that a different place was intended. This is a rule of construction predicated upon the presumed intention of the parties when making the contract.[2] This rule is not changed by the fact that plaintiffs did not have the goods on hand at their place of business at the time of the sale, but had to procure them elsewhere in order to fulfill their contract. Potentially and prospectively the goods were as if then situate in their store."

The question of appropriation in these cases must therefore rest upon the general principles already considered,[3] *i. e.*, that

in Neimeyer Lumber Co. v. Burlington R. Co., *supra:* "The initial letters 'f. o. b.' in contracts of sale, when the property is to be transported, mean 'free on board' the cars at a designated place, whether that be the initial point of shipment or place of final destination. They imply that the buyer shall be free from all the expenses and risks attending the delivery of the property at the point named in the contract for such purpose." See, further, as to the effect of a contract to deliver f. o. b. at place of destination, *post*, § 741, note; also *post*, §§ 795–797.

[1] In Janney v. Sleeper (1883), 30 Minn. 473, 16 N. W. R. 365.

[2] The court cited Benj. on Sales, §§ 1018, 1022; 2 Chitty on Cont. 1201, 1202; 2 Kent, 505; Middlesex Co. v. Osgood, 4 Gray (Mass.), 447; Smith v. Gillett, 50 Ill. 290; Hamilton v. Calhoun, 2 Watts (Pa.), 139; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Rice v. Churchill, 2 Denio (N. Y.), 145; Wilmouth v. Patton, 2 Bibb (Ky.), 280; Sousely v. Burns, 10 Bush (Ky.), 87.

[3] See *ante*, § 724 et seq.

there is a sufficient appropriation when the party who, by the contract, has authority to make it, has conclusively and finally designated the goods which are to be sold.[1]

§ 735. —— Effect of putting goods into buyer's conveyance.— Putting the goods into the buyer's receptacles,[2] as has been seen, or into his ship or other conveyance,[3] would ordinarily be such an appropriation; but even here, as will be seen, this result may be defeated by acts indicative of a contrary intent, as where, though the goods are put on board a vessel sent by the buyer, the bill of lading is taken to the seller's order for the purpose of reserving control over them.[4]

4. *Of Appropriation where Seller is to Send Goods by Carrier.*

§ 736. How when the seller is to send the goods by carrier. The most common form in which the question arises is that in which goods are ordered to be transmitted to the purchaser by carrier. In such cases there may be a carrier specially designated, or the contract may provide for shipment by *some* carrier without specifying any, or it may be entirely silent upon the subject. As to such cases it is said:[5] "The question as to what acts are necessary to be performed by a vendor under an executory agreement for the sale of unspecified goods in order to transfer the title to the vendee and subject him to the risk of the carriage, depends entirely upon the agreement, either express or implied, between the parties. If the vendor undertakes to make the delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent

[1] See Andrews v. Cheney (1882), 62 N. H. 404.

[2] *Ante*, § 727; Langton v. Higgins (1859), 4 H. & N. 402; Aldridge v. Johnson (1857), 7 El. & Bl. 885.

[3] See Turner v. Liverpool Dock Trustees (1851), 6 Ex. 543; Ellershaw v. Magniac (1843), 6 Ex. 570; Brandt v. Bowlby (1831), 2 B. & Ad. 932; Van Casteel v. Booker (1848), 2 Ex. 691; Moakes v. Nicolson (1865), 19 C. B. (N. S.) 290; Schotsmans v. Railway Co. (1867), 2 Ch. App. 332; Gumm v. Tyrie (1864), 33 L. J. Q. B. 97, 34 id. 124; Rochester Oil Co. v. Hughey (1867), 56 Pa. St. 322.

[4] See *post*, § 774.

[5] In Magruder v. Gage (1870), 33 Md. 344, 3 Am. R. 177.

of the vendor, and the property will not pass until the delivery is actually made.[1] On the other hand, if the goods are delivered to a carrier specially designated by the purchaser, he becomes the agent of the latter, and the title to the property, as a general rule, will pass the moment the goods are dispatched.[2] Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee."[3]

[1] See as to this, *ante*, § 733.

[2] "In general, a delivery of goods to a common carrier, and, *a fortiori*, to one specially designated by the buyer, is a delivery to the buyer." Hobart v. Littlefield (1881), 13 R. I. 341. To like effect: Stanton v. Eager (1835), 16 Pick. (Mass.) 467; Wing v. Clark (1844), 24 Me. 366; State v. Peters (1897), 91 Me. 31, 39 Atl. R. 342; Scharff v. Meyer (1896), 133 Mo. 428, 34 S. W. R. 858, 54 Am. St. R. 672; State v. Wingfield (1893), 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406; Dyer v. Great Northern Ry. Co. (1892), 51 Minn. 345, 53 N. W. R. 714, 38 Am. St. R. 506; Wilcox Silver Plate Co. v. Green (1878), 72 N. Y. 17; Wade v. Hamilton (1860), 30 Ga. 450. Delivery of the goods to the servant or agent of the purchaser is equivalent to delivery to the purchaser. Bonner v. Marsh (1848), 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754.

[3] When the goods are left by the seller with a common carrier to be delivered to the purchaser without any qualification or restriction, the title thereupon and thereby passes to the purchaser, and the seller cannot afterwards stop them or change their destination, unless under such circumstances as justify a seller in exercising the right of *stoppage in transitu*. Philadelphia, etc. R. Co. v. Wireman (1879), 88 Pa. St. 264; Schmertz v. Dwyer (1866), 53 Pa. St. 335; Johnson v. Stoddard (1868), 100 Mass. 306; Merchants' Nat. Bank v. Bangs (1869), 102 Mass. 291; Prince v. Boston & L. R. Co. (1869), 101 Mass. 542, 100 Am. Dec. 129; Krulder v. Ellison (1871), 47 N. Y. 36, 7 Am. R. 402; Dutton v. Solomonson (1803), 3 B. & P. 582; Cork Distilleries Co. v. Railway Co., L. R. 7 H. L. 269; Johnson v. Railway Co. (1878), 3 C. P. D. 499; Fragano v. Long (1825), 4 B. & C. 219; Bryans v. Nix (1839), 4 M. & W. 775; Bailey v. Railroad Co. (1872), 49 N. Y. 70; Torrey v. Corliss (1851), 33 Me. 333; Neimeyer Lumber Co. v. Burlington R. Co. (1898), 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534; Kessler v. Smith (1890), 42 Minn. 494, 44 N. W. R. 794; Leggett & Meyer Tobacco Co. v. Collier (1893), 89 Iowa, 144, 56 N. W. R. 417, and many other cases cited in these cases. This will be true even though the goods have yet to be weighed at the point of destination in order to ascertain the price (Odell v. Boston & Me. R. Co. (1871), 109 Mass. 50), or though the consignor guarantees the payment of the freight and makes a special agreement as to the carriage. Stafford v. Walter (1873), 67 Ill. 83. Where, by the terms of the agreement, the goods are to be placed on a

Where no carrier is specified, and a choice is open to the shipper, the selection of any one, in good faith and in the usual course of business, will suffice.

§ 737. ——. In a later case[1] the rule was very carefully stated thus: "When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected,— the goods when delivered to the carrier are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*."

§ 738. ——. Such a delivery, however, will not transfer the title if transmission by a carrier were neither expressly or impliedly agreed upon, nor justified by the previous conduct of the parties or the usage of trade.[2]

§ 739. —— **Effect of such delivery to carrier.**— The effect of the delivery to the carrier under proper circumstances is thus not only to transfer the title, but also to fix ordinarily the

car at the seller's place of business, and the buyer is to accept the seller's weight and grade, the title passes when the goods are so deposited. McKee v. Bainter, 52 Neb. 604, 72 N. W. R. 1044.

[1] Wheelhouse v. Parr (1886), 141 Mass. 593, 6 N. E. R. 787.

[2] If goods ordered are delivered to a carrier without any express or implied direction so to send them, then such delivery will not operate to pass the title and the risk to the vendee. Loyd v. Wight (1856), 20 Ga. 574, 65 Am. Dec. 636 (citing Coats v. Chaplin, 3 Ad. & El. (N. S.) 483, to same effect); Hague v. Porter (1842), 3 Hill (N. Y.), 141; Everett v. Parks (1872), 62 Barb. (N. Y.) 9. But the vendee's consent that the goods shall be sent by carrier may be implied from the usage of trade. Hague v. Porter, *supra;* Leggett & Meyer Tobacco Co. v. Collier (1893), 89 Iowa, 144, 56 N. W. R. 417; Watkins v. Paine (1876), 57 Ga. 50; Star Glass Co. v. Longley (1880), 64 Ga. 576.

time and *place* at which the title passes.[1] With the title also go the risk and the liability, and the seller may recover the price, though the goods never arrive, or, without his fault, are injured on the way.[2] The goods, moreover, having become the property of the buyer are subject to the same rights and liabilities as his other goods, and are taxable or attachable, as well as transferable, as his own. The seller, further, thus performs on his part, and the order for the goods is no longer open to withdrawal or revocation by the purchaser.[3]

[1] Thus, in Sarbecker v. State (1886), 65 Wis. 171, 56 Am. R. 624, it is said: "We are constrained to hold that where the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer in one city receives through his agent residing in another an order for goods from a customer there, and fills the order by delivering the goods to a common carrier at the place of manufacture, consigned to such customer at his place of residence, or to such agent for him, the sale is complete and the title passes at the place of shipment, even though the customer on receiving the goods at his place of residence pays to such agent there the purchase price. . . . The same principle has frequently been applied in the sale of liquors to a purchaser residing in a place where all such sales, or all such sales without license, were prohibited. Garbracht v. Com., 96 Pa. St. 449, 42 Am. R. 550; Finch v. Mansfield, 97 Mass. 89; Abberger v. Marrin, 102 Mass. 70; Brockway v. Maloney, 102 Mass. 308; Dolan v. Green, 110 Mass. 322; Frank v. Hoey, 128 Mass. 263; Hill v. Spear, 50 N. H. 253, 9 Am. R. 205; Tegler v. Shipman, 33 Iowa, 194, 11 Am. R. 118; Boothby v. Plaisted, 51 N. H. 436, 12 Am. R. 140; Shuenfeldt v. Junkermann, 20 Fed. R. 357." See also State v. Wingfield (1893), 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406; Com. v. Fleming (1889), 130 Pa. St. 138, 18 Atl. R. 622, 17 Am. St. R. 763; State v. O'Neil, 58 Vt. 140, 56 Am. R. 557; State v. Carl, 43 Ark. 353, 51 Am. R. 565; State v. Peters, 91 Me. 31, 39 Atl. R. 342. See also further in chapter on Illegal Sales, *post*, §§ 1125 et seq.

[2] If goods are properly delivered to the carrier, the risk of loss, injury or depreciation falls from that time upon the purchaser. Diversy v. Kellogg (1867), 44 Ill. 114, 92 Am. Dec. 154; Whiting v. Farrand (1814), 1 Conn. 60; Ranney v. Higby (1855), 4 Wis. 154, 5 Wis. 62; Janney v. Sleeper (1883), 30 Minn. 473; Magruder v. Gage (1870), 33 Md. 344, 3 Am. R. 177; Burton v. Baird (1884), 44 Ark. 556; Mobile Fruit Co. v. McGuire (1900), — Minn. —, 83 N. W. R. 833; Lord v. Edwards, 148 Mass. 476, 20 N. E. R. 16, 2 L. R. A. 519; Mee v. McNider, 109 N. Y. 500, 17 N. E. R. 424. The fact that the seller has a lien upon them for the price (see *post*, the Seller's Lien), or has reserved the *jus disponendi* (see *post*, ch. VI), will not necessarily operate to prevent the risk from passing to the buyer upon the shipment. Hobart v. Littlefield (1881), 13 R. I. 341, and other cases referred to in the note to the following section.

[3] Leggett & Meyer Tobacco Co. v.

§ 740. —— Intention governs.— The delivery to the carrier to pass the title must be unconditional and made with the intention that the title shall pass thereby.[1] Of this intention, where the facts are in dispute, the jury is to judge. Consigning the goods without restriction to the purchaser, or assigning and transmitting to him the bill of lading, are strong evidences of an intention to pass the title, and cannot be controlled by secret determinations to the contrary.[2] And so though the

Collier (1893), 89 Iowa, 144, 56 N. W. R. 417.

[1] Godts v. Rose (1855), 17 Com. B. 229.

[2] In Wigton v. Bowley (1881), 130 Mass. 252, it is said: "In the sale of specific chattels an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title, if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. Merchants' National Bank v. Bangs, 102 Mass. 291. If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs. Foster v. Ropes, 111 Mass. 10; Upton v. Sturbridge Mills, 111 Mass. 446. Where there is conflicting evidence as to intention the question is for the jury. It cannot be disposed of as matter of law unless the evidence will justify a finding but one way. National Bank of Cairo v. Crocker, 111 Mass. 163; National Bank of Chicago v. Bailey, 115 Mass. 228; Alderman v. Eastern Railroad Co., 115 Mass. 233." In Merchants' National Bank v. Bangs (1869), 102 Mass. 291 (*supra*), it is said: "In all completed contracts of sale property in the goods sold passes to the buyer, although they may not have come to his actual possession. An unconditional sale of specific chattels passes the title at once, and the buyer takes the risk of loss and has the right to immediate possession. When anything remains to be done in the way of specifically appropriating the goods sold to the contract, the agreement is executory and the property does not pass. When, from the nature of the agreement, the vendor is to make the appropriation, then, as soon as any act is done by him identifying the property and it is set apart with the intention unconditionally to apply it in fulfillment of the contract, the title vests and the sale is complete. Thus the delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be sufficient. If the bill of lading or other written evidence of the delivery to the carrier be taken in

goods are, by the terms of the contract, to be paid for by note

the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in course of transportation to the place of destination by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred on payment of the price by his own or his agent's indorsement to the purchaser, and in all cases when he manifests an intention to retain this *jus disponendi* the property will not pass to the vendee. Practically the difficulty is to ascertain, when the evidence is meagre or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them unless it is plain as matter of law that the evidence will justify a finding but one way. Allen v. Williams, 12 Pick. (Mass.) 297; Stanton v. Eager, 16 id. 467; Stevens v. Boston & Wor. R. Co., 8 Gray (Mass.), 262; Coggill v. Hartford & N. H. R. Co., 3 id. 545; Moakes v. Nicolson, 19 C. B. (N. S.) 290; Godts v. Rose, 17 C. B. 229; Tregelles v. Sewell, 7 H. & N. 574."

In Wigton v. Bowley, *supra*, A ordered a car-load of flour of B, at an agreed price f. o. b., and authorized him to draw for the price at ten days' sight. B delivered the flour to a carrier, taking a receipt in which A was named as consignee, and sent it, attached to a draft, to a bank, with directions to deliver the receipt on acceptance of the draft. The draft was not accepted, and it and the receipt were returned to B. A sold the flour to C. who bought in good faith and obtained possession of it from the carrier. *Held*, that these facts justified a finding that the title to the flour passed to A upon delivery to the carrier and that B could not recover it from C.

In Browne v. Hare (1858), 3 H. & N. 484, 4 H. & N. 822, defendant ordered of plaintiffs, through their broker, a quantity of oil, to be shipped f. o. b. Plaintiffs shipped the oil, and wrote their broker to so advise defendant, which he did. The bill of lading was taken to plaintiffs' order or assigns. They indorsed the bill of lading to defendant and sent it with invoice to the broker. He sent these papers to defendant. The ship was actually lost before the papers were received by the broker, but defendant did not learn of it until two hours after he had received the bill of lading from the broker, when he at once returned it. *Held*, that the title had passed. Said Erle, J.: "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to, and under that we think the property passed when the goods were placed free on board in performance of the contract. In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. If the bill of lading

or in cash on arrival,[1] or though the seller takes a bill of lading in his own name and retains it, the title may still pass upon the

had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances."

[1] Thus, in Farmers' Phosphate Co. v. Gill (1888), 69 Md. 537, 16 Atl. R. 214, 1 L. R. A. 767, 9 Am. St. R. 443, it is said: "We think the law is well settled that where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specified quantity by delivering them to a vessel designated by the buyer, or, in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival does not prevent the title from passing or make either payment or arrival a condition precedent thereto. In such case the goods become the property of the vendee, and are at his risk from the time they are put on board the vessel," citing Magruder v. Gage, 33 Md. 344, 3 Am. R. 177; Appleman v. Michael, 43 Md. 269; Dutton v. Solomonson, 3 Bos. & Pul. 582; Fragano v. Long, 4 B. & C. 219; Alexander v. Gardner, 1 Bing. N. C. 671.

See also Sarbecker v. State (1886), 65 Wis. 171, 56 Am. R. 624, where it is said that the title will pass on delivery to the carrier, even though the purchaser on receiving the goods at his place of residence pays the purchase price there to the seller's agent. To like effect: State v. Wingfield (1893), 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406, citing State v. Hughes, 22 W. Va. 743.

C. O. D.—As to the effect where goods are sent C. O. D., the authorities are in conflict.

In State v. Intoxicating Liquors (1882), 73 Me. 278, where liquors had been ordered in Maine from a firm in Boston to be sent by express C. O. D., and they were so sent, the court held that the title passed on the delivery to the carrier in Boston. The same rule was adhered to in a case of the sale of "butterine." State v. Peters (1897), 91 Me. 31, 39 Atl. R. 342.

In Com. v. Fleming (1889), 130 Pa. St. 138, 18 Atl. R. 622, 17 Am. St. R. 763, 5 L. R. A. 470, where the question was as to the place of sale of intoxicating liquors shipped C. O. D. on order from one county to another, it was held that the title passed upon delivery to the carrier, and that the only effect of the terms C. O. D. was to make the carrier the agent of the

delivery to the carrier if such were the intention.[1] Notice of the shipment is not necessary unless stipulated for.[2]

seller to collect the price. Three judges dissented. State v. Carl (1884), 43 Ark. 353, 51 Am. R. 565; Pilgreen v. State (1882), 71 Ala. 368; Brechwald v. People (1886), 21 Ill. App. 213, are similar. Norfolk Southern R. Co. v. Barnes (1889), 104 N. C. 25, and Crook v. Cowan (1870), 64 N. C. 743, are to same effect.

On the other hand, in State v. O'Neil (1885), 58 Vt. 140, 56 Am. R. 557 (see also O'Neil v. Vermont, 144 U. S. 323, where the question is discussed, but writ of error dismissed for want of jurisdiction); United States v. Shriver (1885), 23 Fed. R. 134 (s. c. *sub nom.* People v. Shriver, 31 Alb. L. Jour. 163); State v. Wingfield (1893), 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406, where intoxicating liquors were sent C. O. D., it was held that the title did not pass until payment and delivery. So also United States v. Cline (1885), 26 Fed. R. 515. See also Wagner v. Hallack (1877), 3 Colo. 176.

A consignee to whom goods are shipped C. O. D. has neither title nor right of possession which will sustain replevin for the goods against the carrier, before payment and delivery. Lane v. Chadwick (1888), 146 Mass. 68, 15 N. E. R. 121.

[1] The intention governs, and title may pass even though consignor takes the bill of lading in his own name and does not send it to vendee. Straus v. Wessel (1876), 30 Ohio St. 211; Joyce v. Swann (1864), 17 C. B. (N. S.) 84. To like effect: Hobart v. Littlefield (1881), 13 R. I. 341.

In Joyce v. Swann, *supra*, the court said: "It is true that the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unindorsed. That was a circumstance which was well worthy the attention of the jury and might have induced them to come to a contrary conclusion. But if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to [an agent] instead of to [the buyer] direct was not sufficient to annihilate the other evidence in the cause, though it might induce the jury to pause. The cases of Wait v. Baker, 2 Ex. 1, and Browne v. Hare, 3 H. & N. 484, 4 id. 822, appear to me clearly to establish the distinction that if, from all the facts, it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property; but if the whole

[2] "The general rule with respect to consignments to third persons, so as to place the property at the risk of the buyer, is that notice shall be given. Goom v. Jackson, 5 Esp. 112. But where the carrier or warehouseman is named or indicated by the buyer, a delivery to the carrier, etc., is a delivery to the buyer. Dawes v. Peck, 8 T. R. 330; Cooke v. Ludlow, 2 Bos. & P. (N. R.) 119." Bradford v. Marbury (1847), 12 Ala. 520, 46 Am. Dec. 264.

§ 741. —— Payment of freight as evidence.— It has been thought in a few cases[1] that the fact that the seller was to pay the freight would operate to prevent the passing of title by delivery to the carrier; but it is clear that this is not conclusive and that the title will pass if such appears to be the intention, notwithstanding such an agreement.[2]

of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result."

In Hobart v. Littlefield, *supra*, where the bill of lading had been issued to the sellers and, having been indorsed in blank, had been attached to a draft on the buyer, the court said: "In the present case the title might pass on the completion of the bargain, and the selection and appropriation of the cotton to that purpose, in such a manner that the goods would be at the buyer's risk and yet the seller retain possession of them by himself or by the master, as his bailee and agent, until paid. If the retention of the bill of lading was merely to retain the possession of the cotton for this purpose, then the title and the risk belonged to the defendants [the buyers]."

But, as will be seen in a following chapter, the seller may adopt this as a method of retaining security for the price, and in such a case the title will not pass until payment or tender of the price. See chapter VI, following.

[1] See. per Holroyd. J., in Fragano v. Long, 4 B. & C. 219. See also Devine v. Edwards, 101 Ill. 138.

[2] Though the fact that the seller pays the freight is some evidence, perhaps *prima facie* evidence, that the title has not passed (Berger v. State, 50 Ark. 20, 6 S. W. R. 15; Suit v. Woodhall, 113 Mass. 391; Havens v. Grand Island L. & F. Co., 41 Neb. 153, 59 N. W. R. 681; McLaughlin v. Marston, 78 Wis. 670, 47 N. W. R. 1058), it is not conclusive, and the title will nevertheless pass if such appears to have been the intention. Neimeyer Lumber Co. v. Burlington R. Co., 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534; Wagner v. Breed, 29 Neb. 720; Mee v. McNider (1888), 109 N. Y. 500, 17 N. E. R. 424; Hobart v. Littlefield, 13 R. I. 341; Tregelles v. Sewell, 7 Hurl. & Nor. 574; Dunlop v. Lambert, 6 Cl. & Fin. 600.

F. O. B.— This agreement that the seller shall pay the freight often takes the form of an agreement to deliver f. o. b. (free on board) at a certain place. The initials f. o. b., it is said, have a well-defined meaning of which the courts takes judicial cognizance; they are not ambiguous and admit of no parol explanation; they mean that the seller is to deliver the goods at the point named free of costs or charges of transportation. Sheffield Furnace Co. v. Hull Coal & Coke Co. (1893), 101 Ala. 446, 14 S. R. 672; Capehart v. Furman Farm Improvement Co. (1893), 103 Ala. 671, 16 S. R. 627.

Where the point at which the goods are to be delivered f. o. b. is the place of shipment, the letters mean that the goods are there to be put on board the vehicle for transportation free from cartage or loading charges.

On the other hand, the fact that the purchaser is to pay the freight is evidence that the carriage is at his risk; but this likewise is not conclusive, for the agreement of the parties may be such that the seller retains the title for security or otherwise, notwithstanding a delivery to the carrier for carriage at the expense of the purchaser.[1]

§ 742. —— **Agreement that goods shall not be paid for unless they arrive.**— So notwithstanding such a delivery to the carrier as will pass the title to the property, it may be evident from the agreement of the parties that the goods were not to be paid for unless they reached their destination, and if such was the agreement it will be given effect.[2] In dealing

Ex parte Rosevear China Clay Co. (1879), 11 Ch. Div. 560; Silberman v. Clark (1884), 96 N. Y. 522.

When the point named is the point of destination, they mean that the seller is to pay the freight to that point. Knapp Electrical Works v. N. Y. Insulated Wire Co. (1895), 157 Ill. 456, 42 N. E. R. 147; Miller v. Seaman (1896), 176 Pa. St. 291, 35 Atl. R. 134.

Where the language is, "Prices f. o. b." at a price named, it indicates the cost of the goods to the buyer at that place. Neimeyer Lumber Co. v. Burlington, etc. R. Co. (1898), 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534.

Under an agreement to deliver f. o. b. at maker's shop, the goods are delivered and title passes when goods placed on the cars for shipment, though the bill of lading may not actually be issued and dated until a few days later. Congdon v. Kendall (1898), 53 Neb. 282, 73 N. W. R. 659.

[1] See second chapter following.

[2] This is clearly shown by the famous case of The Calcutta Co. v. De Mattos (1863), 32 L. J. Q. B. 322, 33 id. 214. In that case A contracted to supply to B one thousand tons of coal, delivered at Rangoon alongside craft, etc., as might be directed by B; the price to be 45*s.* per ton delivered at Rangoon; payment, one-half of invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash at five per cent. discount at A's option; and the balance in cash on right delivery at Rangoon. A chartered a ship in pursuance of his contract and shipped on board one thousand one hundred and sixty-six tons of coal, and delivered to B the bill of lading and a policy covering half the invoice price, and B paid the half invoice price. On the voyage the ship became disabled, and the master chartered another vessel and transhipped eight hundred and fifty tons of the coal at 45*s.* per ton freight to Rangoon. On arrival at Rangoon the master of this latter vessel offered the coal to B's agent for B on payment of the 45*s.* freight; this offer was refused, and the coals were afterwards put up for sale by auction by direction of the master, and were purchased *bona*

with cases of this nature care must be taken to discriminate between those like the ones now under consideration, which involve the question merely of such designation and delivery as will suffice to change an executory into an executed contract, and those previously considered, which involve the ques-

fide by B's agent for B at 25*s.* per ton, that being the best price that could be obtained for them there. A brought an action against B to recover for the other half of the invoice, or at least for the eight hundred and fifty tons which B had obtained as aforesaid; and B brought an action against A to recover back the amount of the half invoice paid to him. The two cases were argued together. In the court of Queen's Bench it was held by Cockburn, C. J., and Wightman, J., that by the contract, though the property in the coal passed to B on the shipment and delivery of the shipping documents, A was bound to deliver the coal at Rangoon, and not having delivered any (as the purchase by B's agent was no delivery under the contract) he was liable to refund to B the half which he had received of the purchase-money and for damages for the non-delivery. By Blackburn and Mellor, JJ., it was held that the property in the coal passed to B, the right of A to the second half of the price being contingent on the right delivery at Rangoon; and that, therefore, under the circumstances that had occurred, neither party had any right of action against the other. On appeal to the exchequer chamber it was held by Erle, C. J., Willes, J., and Channell, B., that the property in the coal passed to B on A's shipping it on board and delivering to B the bills of lading and policy of insurance; and that A having done this was entitled to retain the half of the invoice price that had been paid to him; that A was bound to have delivered to B at Rangoon so much of the coal as arrived there; that the offer of the coal at Rangoon on condition of paying the freight of 45*s.* per ton was not a delivery in accordance with the contract, and therefore that A was not entitled to demand from B any part of the residue of the invoice price; and *semble*, by Willes, J., that B might sue A for the non-delivery at Rangoon, and recover as damages the difference between the 25*s.* per ton which B paid to get the coal and the 22*s.* 6*d.* which B was to have paid under the contract. By Martin and Pigott, BB., *held*, that the property in the coal did not pass to B, but that, by the special terms as to payment, A was entitled to keep the half price paid him, but that he could not recover more, since he had not delivered the coal at Rangoon pursuant to his contract; by Williams, J., that the property in the coal passed to B on the shipment and delivery of the shipping documents; but that A was bound to deliver the coal at Rangoon, and that, as he had not done so, B was entitled to recover back the half price paid, and also any damages sustained by A's breach of contract in not delivering the coal. An extract from the opinion of Blackburn, J., which was approved by a majority of the judges, will be found in the text of the following section.

tion whether a delivery to a carrier is a good acceptance and receipt to satify the statute of frauds.[1] In several cases of the first kind authorities upon the latter question have erroneously been deemed controlling though the true question was clearly different.

§ 743. —— **Further of the intention.**— Upon this question of intention the language of Lord Blackburn in the leading case[2] cited in the note has been often quoted with approval: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier; and if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price.[3]

§ 744. ——. "If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also under-

[1] Thus it is said in Wait v. Baker (1848), 2 Exch. 1: "It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; *and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment or subsequently by part acceptance,* then there is no doubt that the property passes by such delivery to the carrier." See also Cross v. O'Donnell (1871), 44 N. Y. 661, 4 Am. R. 721. The distinction between acceptance and delivery to satisfy the statute of frauds and delivery to pass the title generally is commented upon in Hobart v. Littlefield (1881), 13 R. I. 341.

[2] Calcutta Co. v. De Mattos, 32 L. J. Q. B. 322, 33 id. 214, in Ex. Ch.

[3] Citing Dunlop v. Lambert, 6 Cl. & Fin. 600.

take that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination.[1]

§ 745. ——. "But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier; and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall."

§ 746. **Goods must be sent in conformity with order.**— But in order that the delivery of the goods to the carrier shall operate to pass the title to the consignee, it is essential that the goods so delivered shall conform in quantity and quality with the order given for them, and be sent at the time and in the manner agreed upon. If, therefore, the vendor sends more or less than the quantity ordered or of a different quality,[2] or

[1] Citing Dunlop v. Lambert, *supra*.

[2] In Barton v. Kane (1863), 17 Wis. 37, 84 Am. Dec. 728, an order for five thousand cigars was given. The vendor sent five thousand six hundred and twenty-five. Said the court: "This was no compliance with the order and imposed no obligation on the defendant without showing an acceptance in fact by him after the cigars were received, the burden of which was upon the plaintiff. To constitute a delivery to the carrier, a delivery to the consignee, so as to pass

at a different time, or in a different manner,[1] or otherwise materially vary from the order,[2] the title will not pass unless the

the title and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality with those named in the order. Bruce v. Pearson, 3 Johns. (N. Y.) 534, and Downer v. Thompson, 2 Hill (N. Y.), 137, are clear upon this question, and though the latter was reversed in the court of errors (6 Hill, 208), the main point of reversal cannot arise here. There can be no pretense that the six hundred and twenty-five extra cigars were sent out of an abundance of caution, and to insure a scriptural compliance with the order. They were sent to fill up the case and the defendant was charged with their price. To entitle himself to recover under these circumstances the plaintiff should have shown that the defendant actually received and accepted the cigars sent, upon the terms indicated in the plaintiff's letter notifying him of the consignment." To the same effect are Larkin v. Mitchell Lumber Co. (1879), 42 Mich. 296, 3 N. W. R. 904 (In this case plaintiff had sent more shingles than defendant had ordered; defendant "in good faith and for plaintiff's benefit took them in charge as goods consigned for sale but not purchased, and advanced the freight charges;" while so situated the shingles were destroyed by accidental fire. *Held*, that the title to the excess did not pass and the consignee could recover from the consignor the amount paid for freight); Levy v. Green (1859), 1 E. & E. 969, 102 Eng. Com. L. 968 (where it was held that if the consignor sent less than were ordered of a particular kind, and also other goods not ordered, all in an indistinguishable mass, the consignee might reject the whole consignment); Cunliffe v. Harrison (1851), 6 Ex. 903 (to same effect): Rommel v. Wingate (1869), 103 Mass. 327; Hart v. Mills (1846), 15 M. & W. 85; Dixon v. Fletcher (1837), 3 M. & W. 145 (though if he holds them without objecting within a reasonable time, he waives the defect); Ellis v. Roche (1874), 73 Ill. 280.

The same rule applies where the vendor sends less than was ordered, though if the purchaser assents or accepts the goods the variance may be waived. Richardson v. Dunn(1841), 2 Q. B. 218, 42 Eng. Com. L. 645; Downs v. Marsh (1860), 29 Conn. 409.

So if the goods sent are of a different kind. Gardner v. Lane (1865), 9 Allen (Mass.), 492, 85 Am. Dec. 779; Barton v. Kane (1863), 17 Wis. 38, 84 Am. Dec. 728. The burden is on the seller to show that he complied with the terms of the order. Wolf v. Dietzsch (1874), 75 Ill. 205.

[1] If the seller disregards the instructions of the buyer as to the *method* of shipment or the *carrier* to be employed, the title does not pass and the goods are at the seller's risk. Wheelhouse v. Parr (1886), 141 Mass. 593, 6 N. E. R. 787; Hills v. Lynch (1864), 3 Robt. (N. Y.) 42. As where the goods are ordered to be sent by water but are shipped by land carrier. Corning v. Colt (1830), 5 Wend. (N. Y.) 253. So where the goods are ordered shipped from a certain *place* (Jones v. Schneider (1875), 22 Minn. 279), or at a certain *time* (Hoover v. Maher (1892), 51 Minn. 269, 53 N. W. R. 646).

[2] In Woodruff v. Noyes (1843), 15

purchaser accepts them. *A fortiori* if goods are sent without being ordered no title passes unless they are accepted.

§ 747. **Due care must be used in shipping.**— And not only must the goods conform in quantity and quality with the order and be sent in the manner, if any, designated by the buyer, but the seller must also, if he would pass the title and cast the risk upon the buyer, take such precautions as to packing, directing and shipping the goods as are reasonably necessary to secure their safe arrival at their place of destination. If he neglects to do this, and the goods are thereby lost, the buyer will not be liable for the price.[1]

§ 748. —— **Remedy over against carrier must be preserved.**— And so, "while it is the rule that the delivery of goods bought, to a carrier to be conveyed to the vendee, is a complete delivery to the latter, and vests the property in the goods in him, yet the delivery to a carrier is incomplete to charge the vendee for the price of the goods if lost, unless the vendor, in so delivering them, exercises due care and diligence so as to provide the consignee with a remedy over against the carrier."[2]

But where goods are ordered to be shipped, and no other instructions are given, the seller has implied power to avail him-

Conn. 335, the goods were ordered shipped "to the care of F. W. Bushnell," but they were not so shipped. *Held*, that the purchaser was not bound to accept them.

In Garretson v. Selby (1873), 37 Iowa, 529, 18 Am. R. 14, it appeared that H. W. Selby had ordered goods of plaintiff. Selby was a member of the firm of H. W. Selby & Co., but plaintiff did not know of the existence of the firm. The goods were shipped directed (by mistake) to W. H. Selby, but never came to the possession of H. W. Selby or his firm. The court below held that the plaintiff could not recover for the goods, but the supreme court reversed this, holding that there was a sale and constructive delivery, and that plaintiff could recover unless it were shown that this transposition of the initials caused the loss.

[1] Finn v. Clark (1865), 10 Allen (Mass.), 479, 12 Allen. 522. Goods must be properly packed and protected. Wilson v. Fruit Co., 11 Ind. App. 89, 38 N. E. R. 827.

[2] Clarke v. Hutchins, 14 East, 475; Buckman v. Levi, 3 Campb. 414; Ward v. Taylor, 56 Ill. 494.

self of the usual and appropriate means to accomplish that result. If, therefore, for example, the carrier will not accept goods of a certain kind for transportation without a stipulation limiting his liability, the seller having general instructions to ship by such a carrier has been held to have implied power to stipulate for such a release.[1]

§ 749. —— **Duty to insure.**— "In the absence of a special contract," it is said,[2] "the seller of goods is not bound to insure, nor to impart any information upon the subject of insurance." But such an obligation may undoubtedly be imposed by agreement, or instructions, or even by a course of dealing to that effect.[3]

§ 750. **What constitutes delivery to the carrier.**— The question, what constitutes such a delivery to the carrier in these cases as will amount to an appropriation of the goods to the contract, has occasioned some difficulty. No inflexible rule can be laid down, but, in general, it must be such an act as unconditionally and unreservedly places the goods in the possession and under the control of the carrier.[4] "What amounts to a delivery to carriers," it was said in one case,[5] "may sometimes be a question of fact for a jury; ordinarily, delivery at their wharf, freight house or warehouse, and bringing it to the notice of the servants of the carriers, would be so considered. A delivery at a wharf may be of itself an incomplete act, to be explained by what has preceded it or by what takes place subsequently.[6] No one would contend that if the [goods] had

[1] Stafford v. Walter, 67 Ill. 83.

[2] Bartlett v. Jewett, 98 Ind. 206. See also Elmore v. Kearney, 23 La. Ann. 479.

[3] See New York Tartar Co. v. French, 154 Pa. St. 273, 26 Atl. R. 425.

[4] See Mechem's Hutchinson on Carriers, § 94 *et seq.*

[5] Hobart v. Littlefield (1881), 13 R. I. 341.

[6] Citing The M. K. Rawley, 2 Low. Dec. 447; British Columbia Sawmill Co. v. Nettleship, L. R. 3 C. P. 499, 502; Packard v. Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; Railroad Co. v. Barrett, 36 Ohio St. 448. See also Schmidt v. Nunan, 63 Cal. 371.

Where the contract is for the sale of a car-load or a boat-load, etc., the title does not pass until the car, boat, etc., is full. Rochester, etc. Oil Co. v. Hughey, 56 Pa. St. 322; Hays v. Pittsburgh Packet Co., 33 Fed. R. 552.

been merely delivered on the wharf, and no information given to the master or his servants of the purpose for which it was delivered, he could be considered as having received it, either so as to bind his owners or as agent of the buyer."

5. *Of Appropriation where Goods Consigned on Account of Previous Advances.*

§ 751. How when goods consigned on account of previous advances.— Analogous to the question of the last sections is that which arises when advances have been made by one person to another upon the strength of consignments thereafter to be made. The question here is what appropriation is sufficient to fix the goods with a lien or charge for the advancements. It most frequently arises where the advances have been made by a factor, and this aspect of the question has been considered in another work;[1] but some general statement of the rules seems desirable here.

§ 752. ——. Upon this question the authorities are in conflict, one line of cases holding that no lien or charge will attach until the goods are actually in the possession of the consignee,[2] while another line maintains that where advances have previously been made in reliance upon a promise to subsequently consign goods, a delivery to a common carrier consigned to the creditor is sufficient.[3] The true rule seems to be that laid

[1] Mechem on Agency, § 1035.

[2] Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Oliver v. Moore, id. 482; Woodruff v. Nashville, etc. R. Co., 2 Head (Tenn.), 87.

[3] Elliott v. Cox, 48 Ga. 39; Hardeman v. De Vaughn, 49 Ga. 596; Wade v. Hamilton, 30 Ga. 450; Nelson v. Railroad Co., 2 Ill. App. 180.

In Bailey v. Hudson R. R. Co. (1872), 49 N. Y. 70, it is said: "If A has property upon which he has received an advance from B upon an agreement that he will ship it to B to pay the advance or pay any indebtedness, he may or may not comply with his contract. He may ship it to C, or he may ship it to B upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B in pursuance of his contract, the title vests in B upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B of the bill of lading."

In Desha v. Pope (1844), 6 Ala. 690, 41 Am. Dec. 76, it is said: "The mere

down by Chief Justice Redfield in Vermont, that in order to give to the party making the advances a charge upon the goods consigned, but not actually received, two things must concur: 1. The consignment must be in terms to the creditor; and

agreement to ship goods in satisfaction of antecedent advances will not, in general, give the factor or consignee a lien upon them for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depositary."

In Vallé v. Cerré (1865), 36 Mo. 575, 88 Am. Dec. 161, it is said: "Where acceptances have actually been given upon the faith of a consignment by bill of lading, there can be no doubt that the consignee acquires such a lien or property in the goods as no subsequent act of conveyance can divest; such an acceptance is held to be an advance upon the particular shipment. Where there has been no advance or acceptance expressly made upon the particular consignment, and the question is only of a general balance of account for previous advances, the case differs not so much in principle as in the evidence required to establish the lien. It matters not whether the lien for a balance of account arises by operation of law from the usage of trade, or from the positive and special agreement and understanding of the parties; and it may extend to all sums for which a factor has become liable as surety or otherwise for his principal, whenever the suretyship has resulted from the nature of the agency, or the express arrangement of the parties, or it has been undertaken upon the footing of such a lien. Whether or not the given consignment is to be considered as made to cover a general balance of account will depend upon the special arrangements, agreement and understanding of the parties: but where such an arrangement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as a constructive delivery to the consignee. In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property with an intention that it shall be a security or a payment to the consignee for the advances he has made."

In an Illinois case it was held that a consignor who had put goods into the possession of a common carrier to be carried and delivered to a factor in pursuance of a preceding arrangement and to apply on prior advances, and had taken a bill of lading in the factor's name, had, before the shipment of the goods and before the delivery of the bill of lading to the factor, the right to change the destination of the goods and that the carrier was bound to obey such directions. Lewis v. Ga-

2, the advances must have been made upon the faith of this particular consignment.[1] These cases are of course distinct from those in which advances have been made in reliance upon a particular shipment of which constructive delivery has been made by the transfer of the bill of lading or other like document.[2]

lena, etc. R. Co., 40 Ill. 281. Same point: Strahorn v. Union Stock Yard Co., 43 Ill. 424, 92 Am. Dec. 142.

[1] In Davis v. Bradley (1855), 28 Vt. 118, 65 Am. Dec. 226, approving Holbrook v. Wight (1840), 24 Wend. (N. Y.) 169, 35 Am. Dec. 607. To the same effect: Hodges v. Kimball (1878), 49 Iowa, 577, 31 Am. R. 158; First Nat. Bank v. McAndrews (1885), 5 Mont. 325, 51 Am. R. 51. See also Grosvenor v. Phillips (1841), 2 Hill (N. Y.), 147; Bonner v. Marsh (1848), 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754.

[2] As in First Nat. Bank v. Dearborn (1874), 115 Mass. 219, 15 Am. R. 92; De Wolf v. Gardner (1853), 12 Cush. (Mass.) 19, 59 Am. Dec. 165.

CHAPTER V.

OF CONTRACTS RESPECTING GOODS TO BE MANUFACTURED OR GROWN.

§ 753. Purpose of this chapter.

I. Where Goods are to be Manufactured.

754. Title ordinarily does not pass until goods are completed and tendered.

755. —— Title does not pass during progress of work.

756. —— Especially if yet to be separated from larger mass.

757. Same rule where goods to be manufactured and shipped.

758. —— Goods must correspond with order.

§ 759. Title may pass sooner if such appears to have been intention.

760. —— Even without actual delivery.

761. When title passes to article designed for, but not annexed to, another.

762. —— Articles to be supplied as repairs or alteration of chattel.

II. Where Goods are to be Grown.

763-765. Title passes when chattel grown and appropriated.

§ 753. Purpose of this chapter.— In the preceding chapter attention has been given to the effect of contracts for the sale of chattels then in existence, but not yet designated, set apart or appropriated to the contract. There yet remains to be considered that class of contracts which relate to the sale of goods not then in existence, but which are to be manufactured, grown or otherwise produced in pursuance of the contract and which are to be supplied in performance of it.[1] This question will be dealt with in the present chapter, and it will be treated under the two heads of contracts for the manufacture of goods to be supplied, and of contracts to grow and supply goods.

[1] The question presupposes an order for goods to be manufactured. Where an order is given to an agent of a manufacturing company for the purchase of goods described in its catalogue and supposed to be in stock, without any knowledge that they would have to be manufactured, and the order is revoked before any notice of its acceptance has been given, and without knowledge that the company was manufacturing the goods, no contract either of manufacture or sale is entered into between the parties. Harvey v. Duffey (1893), 99 Cal. 401, 33 Pac. R. 897.

In an earlier chapter the question whether these contracts are contracts of sale within the provisions of the statute of frauds has been considered; but the question now involved is obviously a different one, namely, "When does the title pass?"

I.

Where Goods are to be Manufactured.

§ 754. Title ordinarily does not pass until goods are completed and delivery tendered.— The question of the time when the title will pass to goods which have been ordered to be manufactured is involved in some little conflict of decision, though the decided tendency of the authorities in the United States is clear. Under a contract for the manufacture of an article, as for the building of a ship or the construction of any other chattel, not existing in specie at the time of making the contract, it is the general rule that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or, at least, is ready for delivery, and, by tender or other equivalent act, is appropriated to the buyer.[1] A few cases hold that the title will not pass until there has been, on the part of the buyer, either an acceptance of the chattel or some "acts or words respecting it from which an acceptance can be inferred."[2] But, by the weight of authority, acceptance by the buyer is not indispensable; if the chattel is produced at the time, and of the kind and quality specified, and in all other respects in compliance with the order, so that the

[1] Under a contract for the sale of two hundred tons of No. 1 pig iron, to be thereafter delivered by a manufacturer who is engaged in the manufacture of various grades and producing large quantities daily, and all the iron so manufactured is piled, as fast as made, upon the dock in separate piles, according as the manufacturer sees fit to grade it, the title to any specific portion will not pass to the buyer in the absence of any act on the part of the seller identifying "any particular piles as belonging to the buyer, or of any inspection or acceptance on the part of the buyer." First National Bank v. Crowley (1872), 24 Mich. 492. See also Tufts v. Lawrence (1890), 77 Tex. 526.

[2] Moody v. Brown (1852), 34 Me. 107, 56 Am. Dec. 640; Rider v. Kelley (1859), 32 Vt. 268, 76 Am. Dec. 176; Gammage v. Alexander (1855), 14 Tex. 414.

buyer ought to accept it, the title will pass upon a tender or offer of delivery even though the buyer refuses to accept it.[1]

§ 755. —— Not during progress of work.— That no title passes, ordinarily, during the progress of the work is now clear. This rule prevails in this country, contrary to the later but in

[1] In Shawhan v. Van Nest (1874), 25 Ohio St. 490, 18 Am. R. 313, Shawhan had ordered of Van Nest, who was a carriage maker, a two-seated wagon to be built by Van Nest from his own materials, in accordance with Shawhan's directions, for a certain price. Van Nest in all respects complied with his contract and tendered the wagon at his shop to Shawhan, and requested him to accept and pay for it, but Shawhan refused to do so. The action was for the price, and Van Nest was held to be entitled to recover. Said the court: "When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he cannot be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between the contract price and what it sold for." Bement v. Smith, 15 Wend. (N. Y.) 493, is to same effect; and so are Gordon v. Norris, 49 N. H. 376; McIntyre v. Kline, 30 Miss. 361, 64 Am. Dec. 163 (in this last case it is said that acceptance by the buyer may be implied from the fact that notice of the completion of the work was given to him and that he made no objection to it); Ballentine v. Robinson, 46 Pa. St. 177. See also Central Lith. & Eng. Co. v. Moore (1889), 75 Wis. 170, 43 N. W. R. 1124, 6 L. R. A. 788, 17 Am. St. R. 186.

In Goddard v. Binney (1874), 115 Mass. 450, 15 Am. R. 112, defendant ordered a buggy to be built for him by the plaintiff according to certain directions, and to be marked with his monogram. Before the buggy was entirely completed, defendant called on plaintiff and asked when it would be done. Plaintiff inquired whether he still wanted it, saying if he did not want it another person did. Defendant replied that he wanted it. Plaintiff finished the buggy according to directions, and sent defendant a bill for it by a clerk, to whom defendant said he would see the plaintiff soon; on a subsequent request by the same clerk for payment defendant replied that he would pay it soon and would see the plaintiff, and upon a third call he directed the clerk to tell plaintiff

conformity with the early English rule,[1] notwithstanding that, by the terms of the contract, the purchaser was to pay and has paid a portion of the price in instalments as the work pro-

that he would come and see him right away. Soon afterwards the buggy was burned without plaintiff's fault. *Held*, that the general ownership had vested in defendant, who must bear the loss. Followed in Moore v. Perrott (1891), 2 Wash. 1, 25 Pac. R. 906.

In Whitcomb v. Whitney (1872), 24 Mich. 486, there was a contract in March for the sale of all the lumber of certain grades which Whitcomb should make during that season, "lumber to be delivered on rail of vessel when lumber is ready to ship or when vessel is ready to send for it." Whitney advanced money on the contract at various times and received one cargo of lumber. In September Whitcomb wrote to Whitney that the lumber was all cut, ready to ship, and the sooner a vessel was sent the better he would like it. On receipt of this letter Whitney sent an inspector who inspected and approved about sixty-four thousand feet, acting for both parties in so doing. As fast as it was inspected the lumber was hauled to the dock ready for the vessel when it should arrive. The inspection was completed on October 6th, and Whitney was notified of that fact on October 11th. On October 9th, however, the lumber was destroyed by accidental fire. In an action for the price it was held that title passed when the lumber was inspected and put on the dock ready for delivery, and that Whitney was liable for the price.

In Fordice v. Gibson, 129 Ind. 7, 28 N. E. R. 303, the court states the rule to be that "ordinarily no title passes until the thing is completely done and notice given to the vendee, or some act done by the vendor designating it as the article sold, either by setting it apart, marking it, or some other similar act," citing First Nat. Bank v. Crowley, 24 Mich. 492; Ballentine v. Robinson, 46 Pa. St. 177; Moline Scale Co. v. Beed, 52 Iowa, 307.

Where the goods were to be manufactured and delivered upon the dock in New York as the buyer should call for them, and he refused to take certain goods so manufactured, the price may be recovered without proof of delivery or tender. Atkinson v. Truesdell (1891), 127 N. Y. 230, 27 N. E. R. 844.

[1] In Woods v. Russell (1822), 5 B. & Ald. (Eng.) 942, a ship-builder had contracted to build a ship for the defendant to be completed by a given date, and the defendant was to pay for her in four instalments, two during construction and two when the ship was launched. Before the ship was finished, the defendant, with the builder's privity, had had the ship measured that he might get her registered in his own name, the ship-builder signing the necessary certificate, and had appointed a master who superintended the construction, had advertised her for a charter and had chartered her for a voyage. The defendant had also paid the third instalment, but before completion the ship-builder went into bankruptcy and the defendant thereupon took possession of the ship in her unfinished condition. The assignees of the bankrupt sued in trover, but it

gressed. It also prevails notwithstanding the fact that the purchaser has furnished a part of the materials, and, by the weight of authority, it prevails though the purchaser not only

was held that the title had passed, the court holding that the act of the builder in signing the certificate to enable defendant to register the ship in his own name was equivalent to a consent that the property should be in defendant from that time.

In Clarke v. Spence (1836), 4 Ad. & El. (Eng.) 448, under a substantially similar contract, the plaintiff had contracted for a vessel to be paid for in instalments and to be constructed under the supervision of his agent. When the ship was partially completed and after several instalments had been paid, the builder became bankrupt, and the defendants were his assignees. The court held that the title had passed upon the ground that the provision for payment in instalments was equivalent to a declaration of an intention that, upon payment of the first instalment, the title should pass to the purchaser.

In Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271, it is said: "The case of Laidler v. Burlinson, 2 M. & W. 602, shows how strictly confined to that simple state of things the doctrine of Clarke v. Spence is held to be."

In Wood v. Bell (1856), 5 El. & Bl. (Eng.) 772; s. c., 6 id. 355, under a like contract, the plaintiff had paid several instalments; had had the work superintended by his own agent; had had his name punched on a plate riveted to the keel of the ship, and, in discussions concerning the execution of an assignment of the ship to the plaintiff, the builder had admitted that the ship was the property of the plaintiff, though he objected to the execution of the assignment. After this, and before the completion of the ship, the builder became bankrupt. *Held*, that the title had passed.

In the United States, Woods v. Russell and Clarke v. Spence have not been generally approved.

In Andrews v. Durant (1854), 11 N. Y. 35, 62 Am. Dec. 55, a contract had been made for the building of a ship, under the inspection of the purchasers' superintendent, to be paid for in instalments. After three instalments had been paid, but before the ship was completed, the builders became insolvent and the ship was seized on execution for their debts. The purchasers replevied her, completed her and treated her as their own. In the meantime the builders made a general assignment for the benefit of creditors, and the assignees brought an action of trover to establish their claim of ownership. It was held, in accordance with the rule stated in the text, that the title had not passed to the purchasers and Clarke v. Spence and Woods v. Russell were disapproved, the court, per Denio, J., saying "that the modern English rule is not founded upon sufficient reasons and that it ought not to be followed." See also Low v. Austin, 20 N. Y. 181; People v. Commissioners, 58 N. Y. 242; Seymour v. Montgomery, 1 Keyes (N. Y.), 463; Wright v. O'Brien, 5 Daly (N. Y.), 54; Comfort v. Kiersted, 26 Barb. (N. Y.) 472; Happy v. Mosher, 47 Barb. 501; Halterline v. Rice, 62 Barb. 593; Dyckman v.

paid the price in instalments as the work progressed, but also, in person or by his agent, superintended the work of construction.

Valiente, 43 Barb. 131; In re Non-Magnetic Watch Co., 89 Hun, 196.

The ruling in Andrews v. Durant was approved and followed under substantially similar circumstances in Hall v. Green (1858), 1 Houst. (Del.) 546, 71 Am. Dec. 96; Elliott v. Edwards (1871), 35 N. J. L. 265; West Jersey R. Co. v. Trenton Car Works (1866), 32 N. J. L. 517; Shaw v. Smith (1880), 48 Conn. 306, 40 Am. R. 170; Clarkson v. Stevens (1882), 106 U. S. 505; The Poconoket, 67 Fed. R. 262. See also Crosby v. Delaware & Hud. Can. Co. (1890), 119 N. Y. 334. 23 N. E. R. 736.

In Merritt v. Johnson (1811), 7 Johns. (N. Y.) 473, 5 Am. Dec. 289, it appeared that A contracted with B to build a vessel for the latter, the former to furnish the timber requisite to complete the frame, and the latter to advance the money and furnish materials for the joiners' work, and the vessel while standing on land hired by A, and in an unfinished condition, was seized on an execution against A and sold to C, who completed the vessel and sold her to D. In an action of trover by B's assignee against D, it was held that the property was in D, and that B had no title until completion and delivery.

In McConihe v. Railroad Co. (1859), 20 N. Y. 495, 75 Am. Dec. 420, it appeared that plaintiff's assignor had made a contract with the defendant to build cars for it, the defendant to furnish the iron boxes needed for the construction. The defendant, though frequently requested, did not supply the boxes within the time agreed, and the builder did all he could without them, but before completion and delivery the cars were burned without his fault. *Held*, on the strength of Andrews v. Durant, *supra*, that the title had not passed to the defendant.

In Shaw v. Smith (1880), 48 Conn. 306, 40 Am. R. 170, the contract was for the manufacture of certain tools for plaintiffs for a price to be paid in instalments. Before completion, but upon a fraudulent representation of full completion, the builder secured the last instalment without delivery of any of them, and then made an assignment for the benefit of creditors. *Held*, that as against creditors no title had passed, and the court also said that no title had passed as between plaintiffs and the builder. McConihe v. Railroad Co., and Andrews v. Durant, *supra*, were cited with approval, as was also Williams v. Jackman, 16 Gray (Mass.), 514, where Bigelow, C. J., said: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This is the general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract." To like effect, Wright v. Tetlow, 99 Mass. 397.

In Clarkson v. Stevens (1882), 106 U. S. 505, the court, through Mr. Justice Matthews, review the cases at some length, and decline to follow the English rule, saying: "The courts of this country have not adopted any

§ 756. —— Especially if goods yet to be separated from larger mass.—*A fortiori*, will not the title pass where, after manufacture, the goods are yet to be separated and set off from a larger mass.[1]

§ 757. Same rule where goods to be manufactured and shipped to buyer.—"In the case of goods to be manufactured," it is said in a late case,[2] "the seller, as he has to tender them, gener-

arbitrary rule of construction as controlling such agreements, but consider the question of intent open in every case to be determined upon the terms of the contract and the circumstances attending the transaction. 1 Parsons, Shipping and Admiralty, 63. And such seems to us to be the true principle. Accordingly we are of opinion that the fact that advances were made out of the purchase-money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery." See also Scull v. Shakespear (1874), 75 Pa. St. 297; In re Derbyshire's Estate, Lang's Appeal (1876), 81 Pa. St. 18: Chambers v. Board of Education (1875), 60 Mo. 370 (quoted from in note to the following section); Wollensak v. Briggs (1887), 119 Ill. 453, 10 N. E. R. 23.

But in Sandford v. Wiggins Ferry Co. (1867), 27 Ind. 522, the court approve the English cases as constituting the common law, and hold that the parties must be presumed to have dealt with them in view; and Clifford, J., in his dissenting opinion in Calais Steamboat Co. v. Van Pelt (1862), 2 Black (U. S.), 380, approves them. So also Butterworth v. McKinly, 11 Humph. (Tenn.) 206; Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640.

[1] New England Dressed Meat & Wool Co. v. Worsted Co. (1896), 165 Mass. 328, 43 N. E. R. 112, 52 Am. St. R. 516.

[2] Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. R. 1017. Here shoe dealers in Ohio ordered of the manufacturers in Massachusetts a quantity of calf and buff shoes according to a sample. The shoes were manufactured in accordance with the sample and shipped to the buyers by railroad. The buyers accepted the buff shoes but rejected the calf shoes, and shipped them back by the same carrier to the makers. The latter refused to accept them, sued the buyers for the price, and garnished the railroad company. *Held*, that the title to the shoes had passed to the buyers. To like effect: Kelsea v. Ramsey & Gore Mfg. Co. (1893), 55 N. J. L. 320, 26 Atl. R. 907, 22 L. R. A. 415; Pacific Iron Works v. Long Island R. Co. (1875), 62 N. Y. 272; Johnson v. Hibbard, 29 Oreg. 184, 44 Pac. R. 287, 54 Am. St. R. 787.

"Of course the title to the shoes could not be vested in the defendants," said the court in Smith v. Edwards, *supra*, "without their consent. But in the present state of the law it does not need argument to show

ally has the right to appropriate the goods to the contract so far that, if he tenders goods conformable to it, the buyer's refusal to accept them is a breach. The buyer cannot say that he would have accepted some other goods had they been tendered. When goods are to be manufactured and forwarded by a carrier to a buyer at a distance, the seller's delivery of such goods to the carrier as bailee for the purchaser passes the title. The seller cannot forward them until they are specified. The delivery is an overt dealing with the goods as those to which the contract applies, and puts them into a position adverse to the seller. Although not strictly a delivery, it is an act having the legal effect of a true delivery, which in common legal language it is said to be.[1] The act is required of the seller by the terms of the contract, and thus is assented to in advance by the buyer, on the condition that, as supposed, the goods answer the requirements of the contract. Therefore it is a binding appropriation of the goods to the contract and passes the title."[2]

§ 758. —— But goods must correspond with the order.— But here, as in other cases of similar appropriation, the goods must be of the kind and in the amount ordered; for if the seller sends more goods than were ordered or different goods than those specified, the title will not pass by the shipment.[3]

that a contract can be made in such a way as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract is made, without a subsequent acceptance by the buyer, if the contract commits the buyer in advance to the acceptance of goods determined by other marks. Middlesex Co. v. Osgood, 4 Gray, 447, 449; Nichols v. Morse, 100 Mass. 523; Brewer v. Housatonic R. Co., 104 Mass. 593, 595; Rodman v. Guilford, 112 Mass. 405, 407; Goddard v. Binney, 115 Mass. 450; Blanchard v. Cooke, 144 Mass. 207, 227; Aldridge v. Johnson, 7 El. & Bl. 885, 899."

[1] Citing Orcutt v. Nelson, 1 Gray, 536, 543; Merchant v. Chapman, 4 Allen, 362, 364; Kline v. Baker, 99 Mass. 253, 254; Hallgarten v. Oldham, 135 Mass. 1, 9.

[2] Citing Putnam v. Tillotson, 13 Metc. 517, 520; Merchant v. Chapman, *supra;* Odell v. Boston & Maine R. Co., 109 Mass. 50; Wigton v. Bowley, 130 Mass. 252, 254; Fragano v. Long, 4 B. & C. 219; Wait v. Baker, 2 Exch. 1, 7.

[3] New England Dressed M. & W. Co. v. Standard Worsted Co. (1896), 165 Mass. 328, 43 N. E. R. 112, 52 Am. St. R. 516.

§ 759. But title may pass sooner if such appears to have been intention.— The criterion here, however, as in other cases, is the intention of the parties, and the general rule yields to an intention, clearly apparent from a view of the whole contract, that the title should pass at some earlier period. It is, of course, clear, as is said by the court in a leading English case, that a man may purchase a ship or other article as it is in progress of construction, and the title will be held to have then passed if that clearly appears to have been the intention of the parties.[1] But such an intention is not decisively shown by the mere fact of payment in instalments, or of superin-

[1] The general rule and the exception to it are well stated by Daly, C. J., in Wright v. O'Brien, 5 Daly (N. Y.), 56, as follows: "Where a party orders a thing to be made, such as a vessel or any other article, it does not become his property until it is delivered into his possession, even though he may have paid for it in advance or furnished a large portion of the materials of which it is constructed; but during its production it is, and after it is finished it continues to be, up to its delivery, the property of the person who produced it, and may be levied upon and sold under execution against him. Mucklow v. Mangles, 1 Taunt. 318; Merritt v. Johnson, 7 Johns. (N. Y.) 473; Johnson v. Hunt, 11 Wend. (N. Y.) 139; Andrews v. Durant, 11 N. Y. 35. But, whilst this is the rule, it is equally well settled that it is competent for the parties to agree that the thing to be produced from the beginning, or at any stage of its production, is to be the property of the person who ordered it, and that where a mutual assent to that effect is shown by unequivocal acts or declarations, the title passes before delivery. Woods v. Russell, 5 B. & Ald. 942; Rohde v. Thwaites, 6 B. & C. 388; Atkinson v. Bell, 8 id. 277; Jackson v. Anderson, 4 Wend. (N. Y.) 474; Whitehouse v. Frost, 12 East, 614; Kimberly v. Patchin, 19 N. Y. 333; Olyphant v. Baker, 5 Denio (N. Y.), 383; Andrews v. Durant, 11 N. Y. 35."

In the case quoted from (Wright v. O'Brien, 5 Daly, 54), it appeared that plaintiff had employed A, an artist, to make a portrait from a photograph of a deceased child, and on making the contract had made him a payment on account. After the portrait was partially completed plaintiff made an arrangement with A (who desired to go abroad) by which he agreed to pay him a certain sum for the work already done, and A agreed to deliver the portrait to B to be finished. *Held*, that the effect of this last agreement was to vest the title to the portrait in the plaintiff, so that it could not thereafter be seized by the creditors of A. Robinson, J., expressed the opinion that the ownership of a picture painted to order is always in the person who gives the order, and that the artist has only a lien upon it for his services.

tendence by the purchaser, though these facts are significant, and in connection with other facts may be conclusive.[1]

§ 760. —— Even without actual delivery.— So it is clear that, if such appears to have been the intention of the parties, the title may vest even though there has been no formal tender of delivery or though the goods still remain in the maker's possession. If that has been done which, according to the intention of the parties, was to mark the transfer of the title, it is enough.[2]

[1] In the case of Briggs v. A Light Boat, 7 Allen (Mass.), 287, Bigelow, C. J., says: "The general rule of law is well settled and familiar that under a contract for building a ship or making any other chattel, not subsisting in specie at the time of making the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, founded for the most part on express stipulations in contracts, by which the property is held to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular agreement in a contract concerning the mode or time of payment of the purchase-money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text-writers, that an agreement to pay the purchase-money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work and see that it is done according to the tenor of the contract, will, of itself, operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant as indicating the intention of the parties, but they are not in all cases decisive. Both of them may co-exist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him. It is a question of intent, arising on the interpretation of the entire contract in each case. If, taking all the stipulations together, it is clear that the parties intended that the property should vest in the purchaser during the progress of the work and before its completion, effect will be given to such intention and the property will be held to pass accordingly; but, on the other hand, it will not be deemed to have passed out of the builder unless such intent is clearly manifested, but the general rule of law will prevail."

[2] Thus, in Brewer v. Michigan Salt Association, 47 Mich. 526, 11 N. W.

What their intention was, when not made clear by the terms of the contract, becomes a question of fact for the jury to determine.[1]

§ 761. When title passes to article intended for, but not made part of, the principal article — Lumber for building. Closely connected with the subject of the preceding sections is

R. 370, it appeared that the defendant had made a contract with Brewer, a manufacturer of salt, to take all the salt he manufactured and to make a specified advance on all received. The salt was to become the property of the defendant as soon as inspected and branded, but plaintiff was to furnish storage for it and be "responsible for the same" until it was delivered at his expense alongside such vessel, car or lighter as the defendant might send for it. A quantity of salt, after being inspected and branded, but while still remaining on plaintiff's premises, was destroyed by accidental fire. *Held*, that the title had passed, and that the clause making him "responsible" made him responsible as bailee only. See also Jenkinson v. Monroe, 61 Mich. 454, 28 N. W. R. 663.

[1] In Weld v. Came, 98 Mass. 152, it appeared that defendants had contracted to manufacture five billiard tables for plaintiffs which they intended to ship to the East Indies. The tables were to be finished within a specified time. and were, by the makers, to be delivered on the wharf, packed in cases ready for shipment, at such vessel as plaintiffs might have. On a certain date plaintiffs notified defendants that they had a ship about to sail, and would take the tables if they were ready. Four were delivered and paid for, but the fifth was not completed. Subsequently plaintiffs were notified that the fifth table was finished, boxed up and ready for shipment, and plaintiffs, without seeing or receiving the table, paid for it. It remained boxed up and set aside in defendants' store-room, and they suggested to plaintiffs that it could be sold to some one else, but plaintiffs declined to have it sold, saying that they intended to ship it. While remaining in this condition the table was destroyed by accidental fire, and this action was brought to recover back the price paid for it. The trial court directed a verdict for the plaintiffs. Said the supreme court: "The defendants were to transport the property to the wharf, and this is a circumstance to be considered by a jury as tending to show that the property was not delivered [that the title had not passed?] But it is not conclusive, and the other circumstances so far explain it that a jury would be authorized to find that the sale was completed by the arrangement that the defendants should store it till a ship should be ready to receive it. There was nothing to be done, such as weighing, measuring, identifying or making payment, and there seems to be no reason for holding that the defendants' creditors could have attached it, or that the plaintiffs could not have demanded it at the shop. We think, therefore, that the question whether the property had passed

that of the passing of title to things intended to constitute a part of the principal article, as the rudder of a ship or engines for a steamship, but not yet actually made a part of it. As to such articles, the English courts, while adopting a more liberal rule than our courts as to the title to the main thing, hold that these accessories do not pass to the purchaser of the main thing until they have actually been affixed to or made a part of it, but having been once affixed they become a part of the main thing though temporarily removed.[1] Under the rule prevailing in the United States, the same conclusion would follow *a fortiori*.[2]

to the plaintiffs should have been left to the jury." See also Kent Iron Co. v. Norbeck, 150 Pa. St. 559, 24 Atl. R. 737.

[1] See Woods v. Russell, 5 B. & Ald. 942; Tripp v. Armitage, 4 M. & W. 687; Goss v. Quinton, 3 M. & G. 825; Wood v. Bell, 6 E. & B. 355. In the latter case the question was as to the engines, plates, irons and planking designed for a ship and in course of preparation for her, but not yet actually put in place. Said the chief justice: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel. But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. Nothing that has not gone through the ordeal of being approved as part of the ship passes, in my opinion, under the contract."

[2] Thus in Chambers v. Board of Education (1875), 60 Mo. 370, a contractor had undertaken to build a school-house for the defendant, under the supervision of the latter's architect, and the work was to be paid for in instalments. Upon the contractor's request, the defendant had advanced him $3,000 to buy lumber for use in the building, upon the parol understanding that it was to become the property of defendant. The lumber was brought upon the lot, but before becoming incorporated in the building was transferred by the contractor to satisfy a debt to a third person. The court held the parol understanding insufficient to transfer the title, and the question thereupon arose whether the title to the lumber had otherwise passed to the defendant. The court below held that it had. "This doctrine," said the supreme court, "was based on the ground that a superintendent was appointed by the orderer (the defendant) and that the manufacturer or builder was to be paid in instalments as the work progressed, and that in such cases, where the materials were inspected and allowed by the superintendent, the title to them at once passed to the purchaser or orderer. But the gen-

§ 762. —— Articles to be supplied by way of repairs or alterations to another chattel.— Where articles are to be supplied by way of repairs or alterations to a chattel, the English courts hold that the title does not pass until the whole of

eral law is otherwise, as the cases in New York and Massachusetts, and indeed in England — unless we except the case of Woods v. Russell (5 B. & Ald. 942),— show; and there must be a special agreement between the contractor and his employer to transfer the property so bought by the contractor to his employer; and in this case there was no such agreement, except the parol one heretofore considered. Or this instruction may have been based on the assumption that when the builder put the lumber on the ground of defendant, with the intention to use it in the building he was to erect on such ground, this alone transferred the title in the materials to the owner of the ground. But this is not the law. The materials belonged to the builder and were at his risk until actually put in the house. The fact that the builder bought them with a view to putting them in the defendant's house did not change their ownership, nor did the inspection of the superintendent or architect have this effect. Johnson v. Hunt, 11 Wend. (N. Y.) 135; Mucklow v. Mangles, 1 Taunt. (Eng.) 319; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289."

In Ellis v. Bonner (1891), 80 Tex. 198, 15 S. W. R. 1045, 26 Am. St. R. 731, a building society had undertaken to build two portable houses for Bonner. The material for the houses had been delivered upon the lot and Bonner had paid the greater part of the contract price when Ellis attached the lumber as the property of the building company. The court held that the rule applicable to the manufacture of chattels did not apply to a case like the present; that it was within the power of the parties by their contract to determine either that the title should vest in Bonner when it was delivered upon the lots, or that it should remain in the building company until the houses were completed; that the contract in this respect would determine whether the lumber was subject to seizure as the property of the building company; that if the contract was intended to be a sale of the material, its delivery upon the lot would be sufficient to pass the title to Bonner; that if the contract was for completed houses, then such delivery and part payment would not be sufficient to pass the title. "But if," continued the court, "under a proper construction of the contract, the title to the material remained in the building company before being put into the building, and was therefore subject to levy for its debts, it does not follow that Bonner had not acquired in it an interest which should be protected. If it be conceded that the title to the material remained in the building company. still it had delivered the lumber to Bonner, and received money from him as a payment upon it under circumstances that justified him in believing, and sufficient to at least show an implied contract, that the very material should be used in the construction of the houses. Under

the work contracted for has been completed, notwithstanding payment has been made in instalments, and the repairs or alterations have been constructed under the supervision of the purchaser.[1]

II.

Where Goods are to be Grown.

§ 763. Title passes when chattel is grown and appropriated to the contract.— A contract to sell and deliver a chattel not then in existence, but subsequently to be grown and produced, "comes by analogy," said the court in Vermont,[2] "within the class of contracts for the manufacture of goods and for their delivery at a future day. In such cases the authorities have abundantly established the general rule that the article must not only be made and offered to the vendee, but that he must accept of it, or it must be set apart for him by his consent, before the title to it will vest in him; and although the

such circumstances the building association would not have been allowed to take the property from Bonner's possession and deprive him of it as a security for the money paid by him." No cases or statutes are cited by the court as authority for its holdings, and the English and American cases are not referred to.

See also Johnson v. Hunt, 11 Wend. (N. Y.) 135. In Abbott v. Blossom (1873), 66 Barb. (N. Y.) 353, it appeared that G., a carpenter, agreed with the defendant to put certain repairs upon the house of the latter. G. was to furnish the lumber required and defendant was to draw it. No separate price was to be paid for the lumber, but the work and materials were to be paid for at a fixed price on the completion of the job. G. selected the lumber to be used and the defendant drew it to the house. G. failed to commence work upon the job and abandoned the contract. The defendant employed other parties to make the repairs and used the lumber in making them. *Held*, that the lumber did not become the property of the defendant, there having been no delivery of it with intent to pass the title. In Hood v. Manhattan Ins. Co. (1854), 11 N. Y. 532, it is said: "It frequently happens that one man owns the keel and employs another, the ship-builder, to furnish materials and finish the ship. Such materials, though completely finished, remain the property of the builder until they actually become a part of the structure of the ship."

[1] See Anglo-Egyptian Navigation Co. v. Rennie (1875), L. R. 10 C. P. 271, distinguishing Clarke v. Spence, 4 Ad. & E. 448; Woods v. Russell, 5 B. & Ald. 942; Wood v. Bell, 5 E. & B. 772; s. c., 6 id. 355.

[2] Rider v. Kelley (1859), 32 Vt. 268, 76 Am. Dec. 176.

cases, to some extent, modify this general rule, as where the parties agree to treat the article as constructively delivered when finished, or as where the vendee finds the materials and superintends or specially directs in the process of manufacture, yet we find nothing to make this case an exception."

§ **764.** ——. The contract in this case was for hops to be grown, cured, packed and inspected in Vermont, and the question was whether a tender of the hops would operate to pass the title. Upon this question it was said: "It is obvious that the parties did not intend, and could not have intended, that a mere tender of the hops by the vendor should pass the title in them to the vendee against his positive refusal to accept them. The hops were to be raised thereafter, were to answer the special description specified in the contract, and were to be of Vermont inspection. The vendee was entitled to examine them, and use his judgment in determining whether they came within the contract. They would not become his property against his consent; although if he wrongfully refused to accept them he would be liable in damages. He was not bound by the offer of delivery to accept them, and treat them as his own. Where the contract so plainly points for something further to be done by the purchaser, some further right or privilege to be exercised by him before actual delivery takes place, and actual possession and title change, there the possession and title must be held to remain in the seller, and he must take charge of the property, and keep or sell the same as he sees fit."[1]

§ **765.** ——. However sound this decision may have been upon its own peculiar facts, it is obvious that the rule laid down, in supposed analogy to the case of goods to be manufactured or supplied, is not that which has been seen to be supported by the weight of modern authority.[2] And no reason is apparent why cases of this description should not fall within

[1] Citing Hale v. Huntley, 21 Vt. 147; Jones v. Marsh, 22 Vt. 144; Gilman v. Hill, 36 N. H. 311; Comfort v. Kiersted, 26 Barb. (N. Y.) 472.

[2] See *ante*, § 754 et seq.

the general rule that, unless a contrary intention is evident, the title would pass when the goods, of the kind agreed upon, are by tender or other equivalent act set apart and appropriated to the buyer.[1]

[1] Thus, in Colorado Springs Live Stock Co. v. Godding (1894), 20 Colo. 249, 38 Pac. R. 58, where the contract was for raising and selling certain crops of alfalfa, and the alfalfa had been raised, cut, stacked and measured as the contract required, it was held that the title then passed and the price could be recovered. Said the court: "While it has been held in some of the cases that the acceptance by the purchaser of an article appropriated by the seller according to the terms of an executory contract of sale is necessary to pass the title, the weight of authority is that the appropriation by the seller of an article, when completed in accordance with the terms of the contract, passes the title without the subsequent assent of the purchaser, and an action for the agreed price can be maintained." See also Wood v. Michaud (1896), 63 Minn. 478, 65 N. W. R. 963.

CHAPTER VI.

OF THE RESERVATION OF THE JUS DISPONENDI

§§ 766, 767. Purpose of this chapter.
768. —— Distinctions.
769. Sending goods by carrier not an appropriation if seller retains power of disposal.
770. —— Methods adopted.
771–773. —— Choice of methods.
774–776. Bill of lading taken to seller's order.
777, 778. —— Purpose and effect.
779. Bill of lading to seller's order attached to draft on buyer.
780. —— Buyer obtaining possession without payment.
§ 781. —— Custom does not affect.
782. Sending invoice, etc., to buyer does not affect.
783–786. —— The rules stated.
787. —— *Resumé* of English cases.
788, 789. Bill of lading consigning goods to buyer.
790–792. Transfer of bill of lading during transit.
793, 794. How when goods sent C. O. D.
795–797. How when goods to be delivered F. O. B.

§ 766. Purpose of this chapter.— It has been seen in an earlier chapter that the question when the title passes is primarily one of the intention of the parties; and the rules which have been heretofore considered are rules of construction applied by the courts in their endeavors to arrive at the intention of the parties where the latter have not made their meaning clear by their agreement. Among other rules it has been found that where the parties have come to an agreement for the present sale of a specific chattel, the title to it, in the absence of anything to indicate a contrary intent, will be deemed forthwith to pass without the necessity of any other act of the parties, such as payment or delivery. But the chattel to be sold is not always designated at the time of the agreement, and in the preceding chapters there has been considered what acts will suffice, where the parties have agreed upon the terms of the contract but not upon the chattel, to subsequently designate the chattel which is to be transferred and to appropriate it to the contract.

§ 767. ——. A variety of acts which have been passed upon by the courts has been enumerated, but it is obvious that the list is not exhaustive owing to the infinite variety of forms in which the transactions of the parties may present themselves. These acts, also, have been held to pass the title because that was presumed to have been the intention of the parties. Such may not always have been their intention, however, and it remains to consider what acts will suffice to indicate an intention that the title shall not pass, notwithstanding such conduct or events as would otherwise have operated to transfer the title.

§ 768. —— **Distinctions.**— In considering this question care must be taken to discriminate between those cases in which the title has passed, though the seller has a right to retain the goods until some act has been done by the buyer, and those in which the act is to be done before the title is to pass even though the goods may have left the possession of the seller,— in other words, between a *lien* and a *reservation of the title.* It is to the latter question that the present chapter is devoted, and to that branch of the latter question which has to do with the subject of the preceding chapters.

§ 769. **Sending goods by carrier is not an appropriation if seller reserves jus disponendi.**— The question now in hand most frequently arises where goods have been ordered from a seller at a distance, who is to transmit them by carrier to the buyer. It was seen in a preceding chapter that when such goods have been unconditionally delivered to the carrier for transportation to the purchaser, such delivery is usually deemed to be an appropriation of the goods to the contract and operates thereupon to transfer the title. Cases, however, frequently arise in which, while he desires and expects to transmit the goods, the seller still desires to retain some hold upon them to secure himself against the insolvency or default of the buyer. The seller in such cases may be content to rely upon his ordinary right of stoppage *in transitu*, or he may desire to retain the title in himself until the goods are paid for. He may, of

course, do this, as was seen in a preceding chapter, by an express stipulation that the title shall not pass until the price is paid; but a simpler and more temporary reservation of control is now the purpose.

§ 770. —— **Methods adopted.**— In accomplishing this purpose one of three methods is commonly employed: 1. The shipper takes a bill of lading providing for the delivery of the goods at the point of destination to his own order or that of his agent, and then transmits the bill of lading to an agent at the place of delivery with instructions not to deliver the goods to the vendee until paid for; 2. The shipper may take a like bill of lading and, attaching it indorsed to a draft upon the purchaser, may deliver the draft for collection to, or may discount it at, some bank which will forward both to a correspondent at the place of delivery, where the latter will deliver the bill of lading to the purchaser upon his paying or accepting the draft; or 3. The shipper may take a bill of lading reciting the delivery of the goods by him to the carrier for transportation to the purchaser (without making them expressly deliverable to the shipper or his order), and may use this in connection with a draft, as in the second method. The first two methods are the most common, particularly in the English cases.

§ 771. —— **Choice of methods.**— Whatever be the method adopted, it must be one calculated to effectuate the purpose and to rebut the presumption arising from unconditional delivery to the carrier. A mere mental act on the part of the seller will not suffice if it be not accompanied by some outward act indicative of a purpose and legally sufficient to retain a hold upon the title other than the mere right of stoppage *in transitu*.

§ 772. ——. The method adopted should, moreover, be an unambiguous and unequivocal one. Thus, where the terms of the invoice showed clearly that the seller deemed the title to have passed, the fact that he sent a bill of lading to his agent

to be used in coercing payment was held not to prevent the passing of the title.[1]

§ 773. ——. The seller must also act in good faith. Thus where, after an unconditional delivery for the buyer to the captain of the buyer's own ship, the seller by misrepresentation obtained from the captain a bill of lading in blank as to the consignee and sent that with draft attached to an agent for collection, it was held that the title had passed and that this dealing with the bill of lading did not affect it.[2]

§ 774. **Bill of lading to seller's order.**— Where the seller takes a bill of lading which expressly stipulates that the goods are to be delivered, at the point of destination, to himself or agent, or to his order or assigns, there is the clearest possible evidence upon the face of the transaction that, notwithstanding such an appropriation of the goods as might have been sufficient to transfer the title to the buyer, the seller has determined to prevent this resu't by keeping the goods within his own control.[3]

[1] Walley v. Montgomery (1803), 3 East, 585.

[2] Ogle v. Atkinson (1814), 5 Taunt. 759.

[3] Craven v. Ryder (1816), 6 Taunt. 433; Ruck v. Hatfield (1822), 5 B. & Ald. 632; Wait v. Baker (1848), 2 Ex. 1; Van Casteel v. Booker (1848), 2 Ex. 691; Ellershaw v. Magniac (1843), 6 Ex. 570; Ward v. Taylor (1870), 56 Ill. 494; Bellefontaine v. Vassaux (1896), 55 Ohio St. 323, 45 N. E. R. 321; Willman Co. v. Fussy (1895), 15 Mont. 511, 39 Pac. R. 738; Dows v. National Exchange Bank (1875), 91 U. S. 618; Seeligson v. Philbrick (1886), 30 Fed. R. 600; Berger v. State (1887), 50 Ark. 20, 6 S. W. R. 15; Bergeman v. Railroad Co. (1890), 104 Mo. 77, 15 S. W. R. 992; Pennsylvania Ry. Co. v. Stern (1888), 119 Pa. St. 24, 12 Atl. R. 756, 4 Am. St. R. 626; North Penn. R. R. Co. v. Commercial Bank (1887), 123 U. S. 727, 8 S. Ct. 266; Libby v. Ingalls (1878), 124 Mass. 503; Furman v. Railroad Co., 106 N. Y. 579, 13 N. E. R. 587; Joslyn v. Grand Trunk Ry. Co., 51 Vt. 92; Peoria Bank v. Railroad Co., 58 N. H. 203; Bank v. Cummings, 89 Tenn. 609, 18 S. W. R. 115, 24 Am. St. R. 618; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. R. 151.

Where the bill of lading is taken to the seller's order, the mere fact that the buyer is named as consignee will not pass the title to him. First Nat. Bank v. Crocker (1872), 111 Mass. 163.

Wait v. Baker, 2 Ex. 1 (*supra*), is a leading case upon the subject of reserving the *jus disponendi* by taking the bill of lading to the shipper's order. There the defendant, who

This evidence, however, is not absolutely conclusive, though, as stated by the supreme court of the United States, "it is held to be almost conclusive."[1]

§ 775. —— Thus, for example, it is possible, even in such a case, that it was the intention of the parties — as where the person occupying the relation of vendor was really acting as agent of the buyer[2] — that the title should pass upon the de-

was a corn factor at Bristol, made a contract by mail with one Lethbridge, a corn factor at Plymouth, to buy from him a quantity of barley f. o. b. at Kingsbridge, for cash on handing bills of lading or acceptance at two months. Lethbridge was directed to charter a vessel and he chartered the "Emerald." Her captain signed a bill of lading, making the barley deliverable at Bristol to the order of Lethbridge or assigns. Lethbridge went to Bristol and called at defendant's office early in the morning, leaving there an *unindorsed* bill of lading and an invoice. He called again later in the day, when a dispute arose, and though the defendant finally said that he accepted the barley and offered to pay the cash, Lethbridge declined it and took away the bill of lading, which he indorsed to plaintiffs for value. When the ship arrived, defendant obtained possession of part of the cargo before plaintiffs presented their bill of lading. The action was trover for the barley so taken and plaintiffs recovered. Parke, B., after pointing out that although a delivery to a carrier is, if nothing further takes place, a delivery to the vendee so as to vest the property in him, but that such was not the case, said: "The delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge. to be delivered to him in case the bill of lading should not be assigned, and, if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge."

[1] Dows v. National Exch. Bank (1875), 91 U. S. 618, *supra*.

[2] This was the case in Van Casteel v. Booker (1848), 2 Ex. 691, where Parke, B., said: "Notwithstanding the form of the bill of lading, the contract may have been made really on behalf of the vendee, though *prima facie* it is made on behalf of the vendor; and it is a question for the jury, to be decided on the evidence, looking at the form of the bill of lading, particularly noticing that it is made freight free, and the language of the invoice, and the immediate transfer of the bill of lading to the [vendees], and other facts, whether the goods were not really delivered on board to be carried for and on account and at the risk of the [vendees]."

livery to the carrier. And notwithstanding the evidence of the bill of lading, there may be other evidence sufficient to overthrow it indicating a contrary intention; as where, from the invoice, it appears that the goods were shipped "for account and at the risk" of the buyer,[1] and the like.

Whether there was such a contrary intention is usually a question of fact for the jury,[2] and it must be shown by evidence sufficiently strong to overcome the presumption arising upon the face of the transaction.[3] In the absence of such a

[1] Walley v. Montgomery (1803), 3 East, 585. So where the goods marked with the initials of the buyer have been delivered to the carrier, and the purchaser has accepted a draft for the price, the fact that the seller takes the carrier's receipt in his own name will not overthrow the presumption that the title passed. Hall v. Richardson (1860), 16 Md. 396, 77 Am. Dec. 303. And where the contract was that the goods should be delivered over the rail of a vessel, and they have been so delivered, the fact that afterwards, at the master's suggestion, a bill of lading in the shipper's name is made out, as the master said, "for the purpose of fixing the freight," will not necessarily defeat the effect of the delivery. Gibbons v. Robinson (1886), 63 Mich. 146, 29 N. W. R. 533. And where the sellers, who were indebted to the buyers, delivered goods to the carrier consigned to the buyers, and wrote them saying "we deliver you this load on our indebtedness," the fact that the shippers took a bill of lading in their own names was held not to defeat the effect of the delivery. Straus v. Wessel (1876), 30 Ohio St. 211, Adams' Cases on Sales, 781.

[2] In Gibbons v. Robinson, *supra*, it is said: "The question of delivery is one of fact, and is mainly governed by the intention of the parties. Where the evidence is equivocal, it is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way," citing Allen v. Williams, 12 Pick. 297; Stanton v. Eager, 16 Pick. 467; Stevens v. Boston, etc. R. Co., 8 Gray, 262; Moakes v. Nicolson, 19 Com. B. (N. S.) 290, 115 Eng. Com. L. 290; Godts v. Rose, 25 L. J. C. P. 61, 84 Eng. Com. L. 229: Tregelles v. Sewell, 7 H. & N. 574. Though where it appears on the face of the documents, the court may decide it as a question of law. Key v. Cotesworth (1852), 7 Exch. 595.

[3] In Browne v. Hare (1859), 4 H. & N. 822, Erle, J., said: "The contract was for the purchase of unascertained goods, and the question has been when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed 'free on board' in performance of the contract. In this class of cases the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor

showing, the transaction will have its natural effect of reserving the *jus disponendi* in the seller, and will prevent a transfer of the title to the buyer until such time as, upon payment or otherwise, the seller, by indorsement or its equivalent, places the goods at the disposal of the buyer.[1] The question is, was it the purpose of the seller, in taking the bill of lading to his own order, to reserve the *jus disponendi* — to retain control of the goods,— or was he desirous that the buyer should take the goods and simply adopted this method as matter of precaution in case the buyer, for any reason, should not take them.[2]

alone. Here it passed by the act of the vendor alone. If the bill of lading had made the goods 'to be delivered to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them 'free on board;' or for the purpose of retaining a control over them and continuing to be owner, contrary to the contract, as in the case of Wait v. Baker, 2 Ex. 1, and as is explained in Turner v. The Trustees of the Liverpool Docks, 6 Ex. 543, and Van Casteel v. Booker, 2 Ex. 691. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances."

[1] Where the seller indorses the bill of lading and sends it to the purchaser he clearly waives the *jus disponendi.* Key v. Cotesworth (1852), 7 Exch. 595; Browne v. Hare (1859), 4 H. & N. 822; Wilmshurst v. Bowker (1844), 7 Man. & Gr. 882. So, also, where he gives the buyer an unconditional order on the carrier for the goods. Hatch v. Bayley (1853), 12 Cush. (Mass.) 27; Hatch v. Lincoln (1853), 12 Cush. 31.

So, though the seller retains the bill of lading, if the goods are actually delivered to and received by the buyer, the *jus disponendi* is gone. Hope Lumber Co. v. Hardware Co. (1890), 53 Ark. 196, 13 S. W. R. 731.

[2] The distinction is clearly shown in Joyce v. Swann (1864), 17 C. B. (N. S.) 84. There it appeared that Seagrave & Co. of Liverpool had contracted to sell a cargo of guano to McCarter of Londonderry. They wrote him February 26th that they had engaged a vessel and would have the cargo on board in a few days and proposed to draw on him for the guano at a certain price per ton. On March 2d McCarter ordered the cargo insured for him. On March 3d he wrote to Seagrave & Co. complaining that the

§ 776. ——. The mere fact, however, that the consignor was the agent of the consignee is not necessarily conclusive, for "where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner

price was too high. On March 4th Seagrave Co., fearing from this letter that McCarter might not accept the guano, took a bill of lading in their own names and insured the cargo on their own account. This bill of lading and an invoice were sent to a partner of the firm who happened to be near Londonderry, and he called on McCarter in the evening on Saturday, March 7th. McCarter was then willing to take the cargo and they met Monday morning, when the bill of lading was indorsed to McCarter and he gave his acceptance for it. It afterwards appeared that the vessel and cargo had been lost on the evening of March 7th. The action was upon the insurance effected by Joyce, the insurance broker, for McCarter, and defendants, the underwriters, contended that McCarter had no insurable interest on March 2d, but the jury found that Seagrave & Co. had put the cargo on board with intention of passing the property to him, and found for the plaintiff. A motion for nonsuit or new trial was denied. The court, per Williams, J., said: "It was a question for the jury, and I think they were warranted in assuming that the guano was put on board pursuant to that contract with the intention of transferring the property from the sellers to the buyers. It is true that the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unindorsed. That was a circumstance which was well worthy the attention of the jury, and might have induced them to come to a contrary conclusion. But, if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading, and of the invoice being transmitted to the partner then in Ireland, instead of to McCarter direct, was not sufficient to annihilate the other evidence in the cause, though it might induce the jury to pause. The cases of Wait v. Baker, 2 Ex. 1, and Browne v. Hare, 3 H. & N. 484, 4 id. 822, appear to me clearly to establish the distinction that, if from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property; but if the whole of the circum-

under a contract to sell and deliver when the purchase price is paid."[1]

§ 777. —— **Purpose and effect.**— This reservation of the title by the seller may be prompted by any one of a number of motives and it may have a variety of effects. Its ordinary purpose, undoubtedly, is to coerce payment of the price by retaining title until payment. In addition to this main purpose and effect, it may have several incidental or collateral effects. It may, for example, determine when and where the title has passed and the sale has been completed within the purview of local statutes forbidding or restricting sales, as in the common case of the statutes forbidding or restricting sales of intoxicating liquors.[2] It may also determine whether or not the goods have become taxable or leviable as the property of the vendee.[3] And in addition to these, as will be seen,[4] it may give to the vendor a wide power of making pledges, sales or mortgages of the goods before they become the property of the original vendee.

§ 778. ——. With the title would also ordinarily be retained the risk, though this must depend upon the manner in which the bill of lading is subsequently dealt with. If, for example, though the bill of lading were taken to the seller's order, he at once indorses it and sends it to the buyer, or gives the latter an order on the carrier for the goods, the title, as has been

stances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result." See also Straus v. Wessel (1876), 30 Ohio St. 211.

[1] Moors v. Kidder (1887), 106 N. Y. 32; Farmers.' etc. Bank v. Logan (1878), 74 N. Y. 568.

[2] Thus, where the *jus disponendi* has been so reserved, the title passes and the sale is completed at the time and place of delivery rather than of shipment. See Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. R. 321; Berger v. State, 50 Ark. 20, 6 S. W. R. 15; Sarbecker v. State, 65 Wis. 171, 56 Am. R. 624; Com. v. Fleming, 130 Pa. St. 138, 18 Atl. R. 622, 17 Am. St. R. 763, 5 L. R. A. 470; State v. O'Neil, 58 Vt. 140, 56 Am. R. 557; State v. Peters, 91 Me. 31, 39 Atl. R. 342; State v. Wingfield, 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406, and many other cases cited in these.

[3] For example, see Merchants' Exchange Bank v. McGraw, 59 Fed. R. 972, 15 U. S. App. 332, 8 C. C. A. 420.

[4] See *post*, §§ 793, 794.

seen, would be vested in the buyer.[1] And if the seller retain the bill of lading merely for the purpose of obtaining payment of the price, but intending that the buyer should have the goods upon payment, the buyer, by the shipment, acquires an interest in the goods which will entitle him to have them upon payment. With reference to such a case Lord Bramwell said on one occasion:[2] "That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged, he must bear the loss. If specially good and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests."

§ 779. Bill of lading to seller's order attached to draft on buyer.— Equally significant of the intention is the case in which the bill of lading, taken to the order of the seller,[3] is indorsed by him and attached to a draft upon the purchaser for the price; and the draft is then delivered to a bank for collection,[4] or is discounted by the bank in reliance upon the secu-

[1] See cases cited in the fifth note to section 775.

[2] Mirabita v. Imperial Ottoman Bank (1878), 3 Exch. Div. 164.

[3] The same effect has been given to the transaction where the bill of lading was a mere receipt, naming the seller as consignor and the buyer as consignee. Emery's Sons v. Irving National Bank (1874), 25 Ohio St. 360, 18 Am. R. 299. See also *post*, §§ 783–786.

[4] **"Time" and "sight" drafts.**— A bill of lading making goods deliverable to the order of the shipper and attached to a time draft drawn on the purchaser and sent to a bank "for acceptance and collection," with no other instructions, has been held to be rightfully delivered by the bank on acceptance of the draft, and passes title to the goods, and the bank need not hold the bill of lading until payment, the time draft being evidence of a term of credit given to the drawee. St. Paul Mill Co. v. Great Western Despatch Co. (1886), 27 Fed. R. 434; National Bank v. Merchants' Bank (1875), 91 U. S. 92; Moore v. Louisiana Nat. Bank (1892), 44 La. Ann. 99, 32 Am. St. R. 332, 10 S. R. 407. See also Marine Bank v. Wright, 48 N. Y. 1; Hall v. Richardson (1860), 16 Md. 396, 77 Am. Dec. 303.

But where the draft is a *sight* draft, or the papers otherwise show that no credit was given, the bill of lading should not be delivered until payment. Second National Bank v. Cummings (1891), 89 Tenn. 609, 24 Am. St.

rity afforded by the bill of lading. In such a case presumptively no title passes to the purchaser until by payment of the draft he has duly obtained the possession of the bill of lading,[1] although the goods have been sent in the buyer's own ship.[2]

R. 618, 18 S. W. R. 115; McArthur Co. v. Old Second Nat. Bank (1899), — Mich. —, 81 N. W. R. 92; Security Bank v. Luttgen (1882), 29 Minn. 363, 13 N. W. R. 151; Kentucky Refining Co. v. Globe Refining Co. (1898), — Ky. —, 47 S. W. R. 602, 42 L. R. A. 353.

[1] In Jenkyns v. Brown (1849), 14 Q. B. 496, it appeared that one Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of the plaintiffs, and taken a bill of lading for it, deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills to a New Orleans banker, to whom he also indorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. It was held that the property did not pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the indorsed bill of lading to the buyer of the bills of exchange he had conveyed to them "a special property" in the cargo; and by the invoice and letter of advice to the plaintiffs he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' rights to the goods would not

[2] Thus, in Turner v. Trustees of Liverpool Docks (1851), 6 Exch. 543, a cargo of cotton had been purchased by customers who sent their own vessel for it and it was placed on board; but the sellers took bills of lading making the goods deliverable "to order or to our [the sellers'] assigns, he or they paying freight . . . *nothing, being owner's property.*" The sellers drew on the purchasers for the price, and the bills were discounted at a bank with the bill of lading as security. The question was whether by delivery on board the buyer's vessel, and the statement in the bill of lading that the goods were his property, the title had so passed as to defeat the claim of the bank. Said the court, per Patteson, J.: "There is no doubt that the delivery of goods on board the purchasers' own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship." To like effect: Ellershaw v. Magniac (1843), 6 Ex. 570; Brandt v. Bowlby (1831), 2 B. & Ad. 932; Van Casteel v. Booker (1848), 2 Ex. 691; Moakes v. Nicholson (1865), 19 C. B. (N. S.) 290; Schotsmans v. Railway Co. (1867), 2 Ch. Ap. 332; Dows v. National Exchange Bank (1875), 91 U. S. 618.

This presumption, however, as in the former case, is not absolutely conclusive, and the title may pass if such appears to have been the intention, notwithstanding the draft.[1]

§ 780. —— Buyer obtaining possession without payment. And, in the ordinary case, even though the bill of lading indorsed by the seller comes into the possession of the buyer, yet if it so comes into his possession upon condition that he will pay the draft, no title passes to him until he has paid it.[2] But

arise till the bills of exchange were paid by them.

In Merchants' Exchange Bank v. McGraw (1894), 59 Fed. R. 972, 15 U. S. App. 332, 8 C. C. A. 420, it appeared that L. & Co. of Milwaukee had bought a quantity of hops from K., M. & Co., in Seattle, on the understanding that the sellers should retain title till payment. In accordance with an undertaking by the Merchants' Exchange Bank of Milwaukee to guaranty payment by L. & Co., the hops were delivered to a carrier at Seattle and K., M. & Co. took a bill of lading in which L. & Co. were named as consignees. This bill of lading was attached to a draft on L. & Co., and the draft was discounted by a bank in Seattle, which then forwarded the draft with bill of lading attached to the Merchants' Exchange Bank for collection. After the delivery of the hops to the carrier (but whether before or after the discount by the Seattle bank was not clear) the hops were attached at Seattle as the goods of L. & Co. In an action by the Merchants' Exchange Bank against the attaching parties, the lower court nonsuited the plaintiff upon the ground that it did not appear that the draft was cashed by the Seattle bank before the levy; but on appeal it was held that there was evidence to go to the jury tending to prove that, up to the time of the delivery of the bill of lading to the Seattle bank, the title to the hops remained in K., M. & Co., and that by the cashing of the draft, and the delivery of the bill of lading to that bank, it acted as the agent of the Milwaukee bank, and that the title passed to the latter.

See also that title does not pass until payment, Freeman v. Kraemer, 63 Minn. 242, 65 N. W. R. 455; Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. R. 321; Baker v. Chicago, etc. R. Co., 98 Iowa, 438, 67 N. W. R. 376; Erwin v. Harris, 87 Ga. 333, 13 S. E. Rep. 513; Scharff v. Meyer, 133 Mo. 428, 34 S. W. R. 858, 54 Am. St. R. 672; Kentucky Refining Co. v. Globe Refining Co., — Ky. —, 47 S. W. R. 602, 42 L. R. A. 353; Bergeman v. Indianapolis, etc. R. Co., 104 Mo. 77, 15 S. W. R. 992; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. R. 738; Jones v. Brewer (1885), 79 Ala. 545.

[1] Hobart v. Littlefield (1881), 13 R. I. 341. See also Straus v. Wessel (1876), 30 Ohio St. 211; Joyce v. Swann (1864), 17 Com. B. (N. S.) 84.

[2] Farmers' Bank v. Logan (1878), 74 N. Y. 568; Shepherd v. Harrison (1871), L. R. 4 Q. B. 196, 4 id. 493, L. R. 5 H. L. 116; Bank of Rochester v.

where the seller has so dealt with the bill of lading for the purpose of securing the payment of the price, the buyer, upon paying or tendering the price, is entitled to have the goods.[1]

Jones (1851), 4 N. Y. 497, 55 Am. Dec. 290; Moors v. Kidder (1887), 106 N. Y. 32, 12 N. E. R. 818; The New Haven Wire Co. Cases (1889), 57 Conn. 352, 18 Atl. R. 266.

In Moors v. Kidder (*supra*), the facts were as follows: Kidder, Peabody & Co., bankers of Boston, Mass., issued a letter of credit to C. C. Bancroft & Co., of Calcutta, authorizing the latter to draw on Baring Bros. & Co., of London, for the cost of shipments of goods, through bills of lading to Boston or New York, to the extent of £3,000, for account of P. M. Swain, guaranteeing that the bills drawn by virtue of this credit would be duly honored by Baring Bros. & Co. Swain, on his part, agreed to provide sufficient funds in London for meeting the payment of whatever bills should be drawn, as they matured. And he further expressly agreed that all property purchased under this arrangement, together with the bills of lading and insurance, was "hereby pledged" to Baring Bros. & Co. as collateral security for the payment of the drafts, and might be sold or otherwise disposed of as Baring Bros. & Co. might deem necessary for their own protection. In due course C. C. Bancroft & Co. drew their draft for account of Swain, for the cost of one hundred cases of shellac, and attached thereto a bill of lading to the order of Baring Bros. & Co., deliverable in New York. The draft was accepted and paid by Baring Bros. & Co. After the arrival of the goods Swain obtained the papers from Kidder, Peabody & Co., as attorneys for Baring Bros. & Co., in order, as he alleged, to enter them at the custom-house and have them warehoused in the name of Baring Bros. & Co. But instead of doing so, he entered them in the name of his broker, and subsequently obtained a loan of $6,000 from the plaintiff on the security of ninety-five of the cases of shellac, for which he gave warehouse receipts. The case turned solely upon the question whether Swain was general owner of the shellac and Baring Bros. & Co. only pledgees. The court held that the property in the goods was vested in Baring Bros. & Co., since their money and credit bought the goods, the bill of lading was to them, the goods were expressly stated by Swain to be held by them as security, and they had the power of absolute disposal.

A similar decision, under an almost identical state of facts, was reached in The New Haven Wire Co. Cases (*supra*). In one of these, which was typical of them all, the New Haven Wire Co., through its agents in England, purchased iron rods from German manufacturers on the credit of Baring Bros. & Co. The said agents drew drafts, accompanied by bills of lading, to the order of the drawees, on Baring Bros. & Co., which the latter accepted and paid at maturity,

[1] Per Cotton, L. J., in Mirabita v. Imperial Ottoman Bank (1878), 3 Exch. Div. 164, quoted *post*, § 783.

§ 781. —— **Custom does not affect.**— An alleged custom that the title should pass upon delivery to the carrier notwithstanding that a bill of lading has been taken to the order of the seller and attached to a draft forwarded for collection has been held invalid.[1]

§ 782. —— **Sending invoice, etc., to buyer does not affect result.**— The mere fact that the seller has sent to the buyer an invoice of the goods in which the specific goods are described and the buyer is named as consignee does not change the result;[2] for, though these acts of themselves might amount to an appropriation, they cannot pass the title in the face of the bill of lading taken to the order of the seller. The same is true also where an unindorsed copy[3] or duplicate[4] of the bill of lading is sent to the buyer, although, as will be seen,[5] where the bill of lading is not taken to the seller's order, but the buyer is named as consignee, then a duplicate of the bill of lading sent to the buyer is as effectual as the original.[6]

under the agreement that the goods, together with the bills of lading, were, in consideration of the credit, sold, assigned and transferred to them as collateral security, subject only to the right of the New Haven Wire Co. to acquire title by the complete and strict performance of their contract as to payment. The court said: "The decisions are so numerous, and by so many courts, to the effect that when a commercial correspondent advances money for the purchase of property and takes possession, either actual or symbolical, he becomes the owner thereof, even when the advancement was made and the property was purchased at the request and for the ultimate use of another, and there is an agreement to transfer title to that other upon the performance of conditions precedent, and ownership was taken solely for the protection of the advancement, that such may be said to be the established rule."

[1] Charles v. Carter (1896), 96 Tenn. 607, 36 S. W. R. 396.

[2] Jenkyns v. Brown (1850), 14 Q. B. 496; Wait v. Baker (1848), 2 Ex. 1; Shepherd v. Harrison (1871), L. R. 4 Q. B. 194, 4 id. 493, L. R. 5 H. L. 116. "The invoice standing alone furnishes no proof of title." Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 4 Am. St. R. 626; Dows v. Milwaukee Bank, 91 U. S. 618.

[3] Wait v. Baker, *supra;* Brandt v. Bowlby (1831), 2 B. & Ad. 932.

[4] Weyand v. Railway Co. (1888), 75 Iowa, 573, 9 Am. St. R. 504, 39 N. W. R. 899.

[5] See *post,* § 788 et seq.

[6] Missouri Pac. Ry. Co. v. Heidenheimer (1891), 82 Tex. 195, 27 Am. St. R. 861, 17 S. W. R. 608.

§ 783. —— **The rules stated.**— In a leading case[1] upon this subject decided in the English court of appeal in 1878, Cotton, L. J., laid down the principles governing the cases as follows: "Under a contract for sale of chattels not specific, the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract; that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property."

§ 784. ——. "If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait v. Baker*,[2] *Ellershaw v. Magniac*[3] and *Gabarron v. Kreeft*[4] (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price."

§ 785. ——. "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be

[1] Mirabita v. Imperial Ottoman Bank (1878), 3 Ex. Div. 164, 31 Eng. R. (Moak's), 200.

[2] 2 Ex. 1.

[3] 6 Ex. 570.

[4] L. R. 10 Ex. 274, 14 Eng. R. 562.

delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Trustees of Liverpool Docks*,[1] *Shepherd v. Harrison*[2] and *Ogg v. Shuter*."[3]

§ 786. ——. "But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does, on payment or tender of the price, pass to the purchaser."

§ 787. —— **Resume' of English cases.**— The rules to be deduced from the English cases are stated by Mr. Benjamin[4] as follows:

"*First.* Where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee.[5]

"*Secondly.* Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as

[1] 6 Ex. 543.
[2] L. R. 4 Q. B. 196.
[3] 1 C. P. Div. 47, 15 Eng. R. 231.
[4] Benjamin on Sales, § 399.
[5] Citing Wait v. Baker, 2 Ex. 1. "See also Dawes v. Peck, 8 T. R. 330; Dutton v. Solomonson, 3 B. & P. 582; London & Northwestern Ry. Co. v. Bartlett, 7 H. & N. 400; Dunlop v. Lambert, 6 Cl. & Fin. 600; Cork Distilleries Co. v. Great Southern Ry. Co., L. R. 7 H. L. 269."

bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried.[1]

"*Thirdly.* The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi* and to prevent the property from passing to the vendee.[2]

"*Fourthly.* The *prima facie* conclusion that the vendor reserves the *jus disponendi* when the bill of lading is to his order may be rebutted by proof that in so doing he acted as agent for the vendee and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was.[3]

"*Fifthly.* That although, as a general rule, the delivery of goods by the vendor, on board the purchaser's own ship, is a delivery to the purchaser and passes the property, yet the vendor may by special terms restrain the effect of such delivery and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of freight because owner's property.[4] And on a sale of goods which are not specific, although the goods have been delivered on board a ship of, or

[1] "This principle," continues the text quoted, "runs through all the cases, and is clearly enunciated by Parke, B., in Wait v. Baker, *supra;* by Byles, J., in Moakes v. Nicholson, 19 C. B. (N. S.) 290; by Bramwell and Cleasby, BB., in Gabarron v. Kreeft, L. R. 10 Ex., at pp. 281 and 285; and by Cotton, L. J., in Mirabita v. Imperial Ottoman Bank, 3 Ex. D. (C. A.), at p. 172. And the above two points were approved as an accurate statement of the law by Lord Chelmsford in Shepherd v. Harrison, L. R. 4 Q. B. 196. in L. R. 4 Q. B. 493, in L. R. 5 H. L. 116."

[2] Citing Wilmshurst v. Bowker, 2 M. & G. 792; Ellershaw v. Magniac, 6 Ex. 570; Wait v. Baker, 2 Ex. 1; Van Casteel v. Booker, 2 Ex. 691; Jenkyns v. Brown, 14 Q. B. 496; Shepherd v. Harrison, *supra;* Gabarron v. Kreeft, *supra;* Ogg v. Shuter, 1 C. P. Div. 47; and Ex parte Banner, 2 Ch. Div. 278.

[3] Citing Van Casteel v. Booker, *supra;* Brown v. Hare, 4 H. & N. 822; Joyce v. Swan, 17 C. B. (N. S.) 84; Moakes v. Nicholson, *supra.*

[4] Citing Turner v. Liverpool Dock Trustees, 6 Ex. 543; Ellershaw v. Magniac, *supra;* Brandt v. Bowlby, 2 B. & Ad. 932; Van Casteel v. Booker, *supra;* Moakes v. Nicholson, *supra;* Falk v. Fletcher, 18 C. B. (N. S.) 403; Schotsmans v. Railway Co., 2 Ch. 332; Gumm v. Tyrie, 33 L. J. Q. B. 97, 34 id. 124.

chartered for, the purchaser, yet, in the absence of any appropriation of the goods in fulfillment of the contract previous to shipment, the fact that the vendor has taken a bill of lading making the goods deliverable to his own order, or that of a third person, will prevent the property in them from passing to the purchaser.[2]

"*Sixthly.* That where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange; and if he refuse acceptance, he acquires no right to the bill of lading or the goods of which it is the symbol.[2] And the vendor may exercise his *jus disponendi* by selling or otherwise disposing of the goods, so long at least as the buyer remains in default.[3]

"*Seventhly.* But although the vendor may intend the transfer of the property to be conditional upon the buyer's acceptance of the bill of exchange, yet, if he puts into the post addressed to the buyer a bill of lading making the goods deliverable to the buyer's order, he thereby abandons all control over the goods, and the property thereupon vests unconditionally in the buyer and does not revest in the vendor on the buyer's failure or refusal to accept the bill of exchange.[4]

"*Eighthly.* When the vendor deals with the bill of lading only to secure the contract price, as, *e. g.*, by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price."[5]

§ 788. **Bill of lading consigning goods to buyer.**—But a question more difficult than those considered in the foregoing sections is presented where the bill of lading, instead of making the goods deliverable to the seller or his order, simply de-

[1] Citing Gabarron v. Kreeft, *supra.*

[2] Citing Shepherd v. Harrison, *supra;* Ogg v. Shuter, *supra;* Rew v. Payne, 1 C. P. D. 47.

[3] Citing Ogg v. Shuter, *supra.*

[4] Citing Ex parte Banner, *supra;* distinguishing Shepherd v. Harrison, *supra.*

[5] Citing Mirabita v. Imperial Ottoman Bank, 3 Ex. Div. 164, determining a point left undecided by Lord Cairns in Ogg v. Shuter, *supra.*

clares that, having been received for carriage from the seller, they are consigned to the buyer. Upon this subject it is said in a leading case:[1] "Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question whether

[1] Emery's Sons v. Irving National Bank (1874), 25 Ohio St. 360, 18 Am. R. 299. In this case it appeared that one Mirrielees of New York had been in the habit of buying goods upon the order of Thos. Emery's Sons of Cincinnati, and shipping those goods to them, drawing drafts upon them with the bill of lading attached. As the result of previous transactions Mirrielees was indebted to Emery's Sons. On March 24, 1869, he shipped three casks of stearine to them, taking from the carrier a bill of lading or receipt which read as follows: "Received from G. M. Mirrielees the following packages (contents and value unknown) in apparent good order, and marked as in the margin: (3) three casks stearine. For Thos. Emery's Sons." In the margin was written "Cin., O." On the same day he drew upon them as follows:

"299\frac{21}{100}$ NEW YORK, March 24, 1869.

"On demand, pay to the order of myself, two hundred and ninety-nine $\frac{21}{100}$ dollars, value received, and charge the same to account of three casks stearine. G. M. MIRRIELEES.

"To Thos. Emery's Sons, Cincinnati."

On March 26th he shipped ten casks of stearine under a substantially similar bill of lading (except that the words "Thos. Emery's Sons" appeared in the margin instead of in the body), and drew upon them a draft similar to the other for $1,098$\frac{42}{100}$. He wrote Emery's Sons of the shipments, inclosing invoices and advising them of the drafts. He attached these bills of lading to the drafts, respectively, and sold the drafts to the Irving National Bank of New York. The bank sent the drafts on to Cincinnati for collection, but Emery's Sons refused to accept or pay them. After the bills of lading and drafts had been transferred to the bank, Emery's Sons obtained the stearine from the carrier and sold it, refusing to account to the bank, but claiming the right to apply the proceeds on the indebtedness of Mirrielees to them. The action was by the bank against Emery's Sons to recover the proceeds. It was held, in an opinion from which the quotation of the text was taken, that the bank was entitled to recover, though a judgment in its favor was reversed for errors in procedure.

In First National Bank v. Dearborn (1874), 115 Mass. 219, 15 Am. R. 92, it appeared that one Parks in Wisconsin had been in the habit of shipping flour to Harvey Scudder & Co. of Boston, drawing upon them for the price. On October 17, 1870, he delivered to a carrier in Wisconsin one hundred barrels of flour and received a receipt in the following terms: "Received from R. G. Parks & Co. one hundred barrels of flour branded W., consigned to Harvey Scudder & Co., Boston, Mass., *via* Green Bay." At the same time Parks made a draft on Scudder & Co. for $400, to the order of the cashier of the plaintiff bank, and delivered to the bank the said receipt. The bank thereupon placed the $400 to Parks' credit. The bank sent the draft and receipt to

the title thereby passes from the vendor to the vendee depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction.

"If the goods be shipped in pursuance of the purchaser's

Boston, where Scudder & Co. refused to accept the draft and disclaimed any interest in it, and the flour on arrival was attached by a creditor of Parks as his property. The action was replevin by the bank against the officer. It was admitted that Parks delivered the receipt to the bank for the purpose of securing the $400, and that it was the understanding of the parties that the flour was transferred as security for the money. Said the court, per Ames, J: "If there was a sufficient delivery of the property to the plaintiff there was nothing to hinder the intention of the parties from going into full effect. The character and situation of the property at the time of this transaction were such that an actual delivery was impossible. A constructive or symbolical delivery was all that the circumstances allowed; but a delivery of that nature, if properly made, would have been sufficient to give to the plaintiff corporation the title to the property and an immediate right of possession, which it could maintain, not only against Parks himself, but also against his creditors. Tuxworth v. Moore, 9 Pick. (Mass.) 347, 20 Am. Dec. 479; Fettyplace v. Dutch, 13 Pick. 388, 23 Am. Dec. 688; Whipple v. Thayer, 16 Pick. 25, 26 Am. Dec. 626; Carter v. Willard, 19 Pick. 1. The delivery of the evidences of title, with orders indorsed upon them, would be equivalent to the delivery of the property itself. Gibson v. Stevens, 8 How. (U. S.) 384; Nathan v. Giles, 5 Taunt. 558; National Bank of Cairo v. Crocker, 111 Mass. 163, and cases there cited. All that would be necessary in such a case would be that the thing actually delivered should have been intended as a symbol of the property sold. . . . It is true that a receipt of this kind does not purport on its face to have the *quasi*-negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement, or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In Haille v. Smith, 1 B. & P. 563, Eyre, C. J., uses this language: 'I see no reason why we should not expound this doctrine of transfer very largely upon the agreement of the parties and upon their intent to carry the substance of that agreement into execution.' In Allen v. Williams, 12 Pick. (Mass.) 297, 301, Shaw, C. J., in delivering the judgment of the court says: 'Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the

order and at his risk, or if it otherwise appear to be the intention of the shipper to part with the title, the carrier becomes the agent of the consignee, and the delivery to him is equivalent to a delivery to the purchaser. If the vendor, however, in making the consignment and delivering the goods to the carrier, does not intend to part with his title to and control over them, the carrier must be regarded as the agent of the consignor and not of the consignee.

§ 789. "In all such transactions," continued the court, "the bill of lading is an important item of proof as to the intention,

delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiff.' It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the court of appeals of the state of New York. Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290. In that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and could call the consignee to account for it, he having converted the property to his own use, without accepting the draft. It is not necessary to hold that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft; and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds. De Wolf v. Gardner, 12 Cush. (Mass.) 19, 24, 59 Am. Dec. 165." Following and approving First National Bank v. Dearborn; see National Bank v. Bayley (1874), 115 Mass. 228; Newcomb v. Railroad Co. (1874), 115 Mass. 230; Alderman v. Railroad Co. (1874), 115 Mass. 233. See also Douglas v. People's Bank (1887), 86 Ky. 176, 9 Am. St. R. 276, 5 S. W. R. 420; Merchants' National Bank v. Bangs (1869), 102 Mass. 291; Hobart v. Littlefield (1882), 13 R. I. 341; Halsey v. Warden (1881), 25 Kan. 128; Wigton v. Bowley (1881), 130 Mass. 252; Robinson v. Pogue (1888), 86 Ala. 257, 5 S. R. 685; The St. Joze Indiano (1816), 1 Wheat. 208.

[But in Hallgarten v. Oldham (1883), 135 Mass. 1, 46 Am. R. 433, the court question First National Bank v. Dearborn, *supra*, on the ground that, in principle, the transfer of the document can only be sufficient when the document originally was made "to order" or the like, or the issuer has subsequently consented to become the purchaser's bailee.]

but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee.

"As between the consignor and consignee, the bill of lading cannot be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction."

§ 790. Transfer of bill of lading during transit.— Continuing in the case referred to in the last section,[1] the court further says: "By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But

[1] Emery's Sons v. Irving National Bank, 25 Ohio St. 360, 18 Am. R. 299, stated in preceding note.

if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him. The principle on which the title to the goods may be transferred by transfer of the bill of lading is wholly distinct from that on which the right of stoppage *in transitu* rests. The right to stop goods in transit exists only where the vendor has consigned them to the buyer under circumstances which vest the title in the buyer. The transfer of goods by delivering the bill of lading can be made only in cases where the vendor has not parted with the title."

§ 791. ——. It is to be kept in mind that the case from which the foregoing language is quoted was one in which the bill of lading had not consigned the goods to the seller's order, but was a mere receipt naming the buyer as the consignee. Where the bill of lading is expressly taken to the seller's order, there can, of course, be no doubt about his power to transfer the title by assignment; but where the seller is simply named as consignor and the buyer as the consignee, then the language of the foregoing section is applicable. In another case[1] of this latter sort the court said: "If a bill of lading in favor of the consignee, although such consignee be the agent or factor of the consignor, may be transferred by the consignor by delivery for a valuable consideration, we can conceive of no reason, in the absence of statutory inhibition, why such bill in favor of a consignee who is a purchaser, when retained by the consignor, may not be transferred in the same way. We can see no difference in principle. If extraneous evidence is admissible to show the real intent of the consignor as to the retention of the title of the goods covered by the bill in the one case, it must be in the other."

§ 792. ——. Where, therefore, the seller by either method has reserved the *jus disponendi*, he may, by assignment of the

[1] Scharff v. Meyer (1895), 133 Mo. 428, 34 S. W. R. 858, 54 Am. St. R. 672.

bill of lading, sell, assign or pledge his interest in the goods as fully as by a delivery of the goods themselves, and the pledgee or assignee for value will obtain a good title, even though such a transfer by the seller were in violation of his contract with the buyer.[1]

Such dealings with the bill of lading — particularly in pledging it as security for discounts or advancements upon bills of exchange drawn against the goods — are of daily occurrence, and the rights of the assignee or pledgee are constantly enforced.[2]

[1] Per Bramwell, L. J., in Mirabita v. Imperial Ottoman Bank (1878), 3 Ex. Div. 164, citing Wait v. Baker, 2 Ex. 1; Gabarron v. Kreeft, L. R. 10 Ex. 274.

[2] When the goods are delivered to the carrier, but the right of disposition is retained in the seller by the bill of lading or receipt, then the delivery of the bill or receipt, even without indorsement, for value transfers the property. Scharff v. Meyer (1895), 133 Mo. 428, 34 S. W. R. 858, 54 Am. St. R. 672. To same effect: Means v. Bank of Randall (1892), 146 U. S. 620; Dows v. National Exchange Bank (1875), 91 U. S. 618; Union Pac. R. Co. v. Johnson (1895), 45 Neb. 57, 63 N. W. R. 144; Bank of Rochester v. Jones (1851), 4 N. Y. 497, 55 Am. Dec. 290; In re Non-Magnetic Watch Co. (1895), 89 Hun, 196; Mich. Cent. R. Co. v. Phillips (1871), 60 Ill. 190; Holmes v. German Bank (1878), 87 Pa. St. 525; Holmes v. Bailey (1879), 92 Pa. St. 57; First Nat. Bank v. Pettit (1872), 9 Heisk. (56 Tenn.) 447; Forbes v. Railroad Co. (1882), 133 Mass. 154; Commercial Bank v. Pfeiffer (1888), 108 N. Y. 242, 15 N. E. R. 311; First Nat. Bank v. Kelley (1874), 57 N. Y. 34; Richardson v. Nathan (1895), 167 Pa. St. 513, 31 Atl. R. 740; Hathaway v. Haynes (1878), 124 Mass. 311; Cayuga Nat. Bank v. Daniels (1872), 47 N. Y. 631; Heiskell v. Bank (1879), 89 Pa. St. 155.

In Mich. Cent. R. Co. v. Phillips (1871), 60 Ill. 190 (*supra*), a number of barrels of wine were shipped to one Ames and hauled to his store, with the evident understanding that payment was to be a condition precedent to the vesting of the title. Upon obtaining possession of the goods Ames shipped them on board a car of the Michigan Central Railroad, consigned to a party in New York, and drew a draft against them, which, with bill of lading attached, was discounted by a Chicago bank. The bill of lading was not indorsed, and it was objected that on this account no valid transfer of title took place, even assuming that Ames was in a position to transfer title. The court held that Ames could transfer a good title, since he had been intrusted with the indicia of ownership by his vendor, and that the bank was a *bona fide* purchaser for value. Delivery of the bill was tantamount to delivery of the goods, and was as efficacious to vest title; and the fact of its being unindorsed would not, as in the case of a negotiable instrument, convey

§ 793. How when goods sent C. O. D.— Whether the seller, who has delivered goods to the carrier for transportation to the buyer, thereby transfers the title, if he send them C. O. D., is a question upon which, it has been seen, the authorities are

only an equitable interest, but the legal title itself passed.

In Commercial Bank v. Pfeiffer (1888), 108 N. Y. 242, 15 N. E. R. 311 (*supra*), the defendants, who were dealers in live-stock in Buffalo, agreed with the plaintiff, a banking corporation of Iowa, to accept and pay the sight drafts of one Quick for cattle and hogs purchased by him, after notification of shipment and receipt of bills of lading. Under this arrangement a shipment was made and a sight draft for $5,631.82 was drawn by Quick to the order of plaintiff's cashier and sent to defendants with bill of lading attached. Defendants obtained the live-stock without the production of the bill of lading, sold the same, and turned over the proceeds of the sale, $5,249.47, to the holder of the draft and bill of lading. The difference between the face of the draft and the amount paid on it, $380.35, the defendants claimed the right to retain on account of a demand held by them against Quick for a loss sustained on a previous shipment. But the court held that the plaintiff, who discounted the draft for Quick and took the bill of lading, had a special interest in the property to the amount of the draft, and the defendants had no right to receive and retain the property and dishonor the draft. The court said: "It is settled beyond dispute in this State that the discount of a draft drawn by a consignor upon his consignee, which is accompanied by the delivery of a bill of lading to the party making the advance, passes to such party not only the legal title to such property, but, in the eye of the law, the transfer of the bill of lading is regarded as an actual delivery and an actual change of possession of the property."

The same question, under practically the same state of facts, was considered in Holmes v. German Bank (1878), 87 Pa. St. 525 (*supra*), and the court held that the defendants could not retain the proceeds of a sale of the goods consigned, on account of an old debt owed by the consignor to them: for the bank, which had discounted a draft drawn by the consignor against the goods and taken the bill of lading as security, had thereby appropriated the proceeds of the sale to the satisfaction of its demand, and this was true whether the bill of lading was indorsed or not.

In Forbes v. Railroad Co. (1882), 133 Mass. 154 (*supra*), a firm of grain dealers in Chicago, in response to an order, forwarded fifty carloads of corn to Boston, consigned by bill of lading to their own order at Boston. A draft upon the purchasers, together with the bill of lading, was sent to a Boston bank, and upon payment by the purchasers of the amount of the draft it was delivered, with the bill of lading, to them. Immediately thereafter the draft and bill of lading were indorsed over to the plaintiffs, as security for an advance then made by the plaintiffs to the full amount of the draft. It

much in conflict.[1] The practice of sending goods C. O. D. is one quite largely confined to those cases in which the carrier is an express company, though it is, of course, available in the case of other carriers.

It is insisted in some cases, as has been already noticed, that the delivery to the carrier has the usual effect to pass the title, and that the result of the instructions to deliver only upon payment, or to collect on delivery, is simply to make the carrier the agent of the seller to collect and return the price.[2] According to this view, obviously, the sale is complete at the time and place of delivery, though the seller has a lien upon the goods for the price and an action against the carrier if he delivers them without obtaining the price.[3]

§ 794. ——. In other cases it is urged that the shipment C. O. D. very clearly makes the carrier the agent of the seller, not only to collect the price, but to carry and deliver the goods.

was held that, by the transfer of the draft and bill of lading by the original purchasers of the corn to the plaintiffs, the title and property in the corn passed to them.

In Means v. Bank (1892), 146 U. S. 620 (*supra*), one Lyons, desiring to purchase cattle from one Patterson, the plaintiff bank paid the purchase-money for Lyons to Patterson, and Patterson delivered the cattle to the bank, and they were shipped by rail to the defendants, in six cars, to sell, accompanied by Patterson, Lyons and one Guthrie. A bill of lading for four of the cars was issued in the name of Lyons. A bill of lading was to be issued for the other two cars in the name of Guthrie, as a pass could be issued to only two persons on one bill of lading. Guthrie had no interest in the cattle. The cattle in the six cars were delivered to the defendants. A draft was drawn by Lyons against the shipment on the defendants, and indorsed and delivered by Lyons to the bank, with the bill of lading for the four cars. The draft and bill of lading were presented to the defendants, but the draft was not accepted or paid. Three hours afterwards the defendants sold the cattle, but kept the proceeds because they claimed that Lyons was indebted to them on an old account. The court held that the bank was entitled to recover the proceeds from the defendants.

[1] See *ante*, § 740, notes.

[2] See State v. Peters (1897), 91 Me. 31, 39 Atl. R. 342; State v. Intoxicating Liquors (1882), 73 Me. 278; Com. v. Fleming (1889), 130 Pa. St. 138, 18 Atl. R. 622, 17 Am. St. R. 763, 5 L. R. A. 470; Norfolk R. Co. v. Barnes (1889), 104 N. C. 25; Pilgreen v. State (1882), 71 Ala. 368; State v. Carl (1884), 43 Ark. 353, 51 Am. R. 565, more fully stated *ante*, § 740, note.

[3] See Com. v. Fleming, *supra*.

"In such cases the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price."[1] According to this view, clearly, the sale takes place at the time and place of delivery to the buyer, and the seller retains the title and the right of disposal until that time.[2]

§ 795. How when goods were to be delivered F. O. B.— Some attention has been given in a previous chapter[3] to the effect of contracts to deliver the goods "f. o. b." (free on board) at a designated place. As has there been seen, such an agreement means ordinarily, where the place specified is the place of shipment, that the seller will put the goods on board the ship or car for transportation without charge to the buyer for cartage or loading; and, where the place specified is the place of delivery, that the seller will also pay the freight to that point.

§ 796. ——. This language, however, especially in the English cases, has often been thought to affect the question of the reservation of the *jus disponendi*. Thus, where the agreement was to deliver the goods f. o. b. at the point of shipment, and the seller took a bill of lading to his own order, but immediately indorsed it and sent it to the buyer, it was held that the agreement to deliver free on board threw light upon the intention with which the bill of lading was so taken.[4] "The real question," said the court, "has been on the intention with which the bill of lading was taken in this form; whether the consignor shipped the goods in performance of his contract to place them 'free on board,' or for the purpose of retaining a

[1] See State v. O'Neil (1885), 58 Vt. 140, 56 Am. R. 557 (see also O'Neil v. Vermont, 144 U. S. 323, where this case was considered at much length, but the writ of error was dismissed for want of jurisdiction); United States v. Shriver (1885), 23 Fed. R. 134 (s. c. *sub nom.* People v. Shriver, 31 Alb. L. Jour. 163); State v. Wingfield (1893), 115 Mo. 428, 22 S. W. R. 363, 37 Am. St. R. 406, more fully stated *ante*, § 740, note.

[2] See also Wagner v. Hallack (1877), 3 Colo. 176.

[3] See *ante*, §§ 733 and 741, notes.

[4] Browne v. Hare (1858), 4 Hurl. & Nor. 822, per Erle, J. See also Stock v. Inglis (1884), 12 Q. B. Div. 564.

control over them and continuing to be owner, contrary to the contract." "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to, and under that we think the property passed when the goods were placed 'free on board' in performance of the contract."[1]

§ 797. ——. But in a later case where the bill of lading, instead of being sent to the buyer, was attached to a draft for the price and sent forward for collection, it was held by the court of appeal that the *jus disponendi* had been effectually retained notwithstanding the agreement to deliver free on board, which the court below had deemed strong evidence of a contrary intention.[2]

Where, however, the language was "Prices f. o. b. Omaha," the majority of the court in Nebraska held that while this might ordinarily "afford a presumption that the delivery was to be made at Omaha and that title should there pass," there was other evidence in the case sufficient to overthrow it and justify the conclusion that the title passed on shipment.[3]

[1] "As in the case of Wait v. Baker, 2 Exch. 1, and (as is explained in Turner v. Trustees of Liverpool Docks, 6 Exch. 543) Van Casteel v. Booker, 2 Exch. 691."

[2] Ogg v. Shuter (1875), L. R. 10 C. P. 159, 1 C. P. Div. 47.

[3] Neimeyer Lumber Co. v. Burlington, etc. R. Co. (1898), 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534.

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